NO. 75-667

In the Supreme Court of the United States

OCTOBER TERM 1975

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Respondents

AND

THE POSTER EXCHANGE, INC.,
Petitioner

versus

COLUMBIA PICTURES CORP., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

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NO.

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION COLUMBIA PICTURES CORP., METRO-GOLDWYN-MAYER, INC., PARAMOUNT FILM DISTRIBUTING CORP., TWENTIETH CENTURY-FOX FILM CORP., UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., WARNER BROTHERS DISTRIBUTING CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner herein, Exhibitors Poster Exchange, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 8, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F. 2d 110, and is reproduced at Appendix A, *infra. p.* The Judgment of the Court of Appeals is reproduced at Appendix B, *infra* p. 49 . The opinion of the United States District Court for the Eastern District of Louisiana is not reported; it is reproduced at Appendix C, *infra.* p. 51 .

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (Appendix B, *infra* . p. 49), and petitioner's timely application for an en banc rehearing was denied on September 24, 1975 (Appendix D, *infra* p. 63). This petition for certiorari is being filed less than 90 days from the date last abovementioned. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1

When successive antitrust suits are commenced to recover damages for losses of income caused by a continuing monopoly, is it not true that each suit involved a new cause of action if in each suit the claim for damages is limited to losses suffered by the plaintiff as a result of restraints imposed subsequent to the date of commencement of the preceding suit?

2

Whether a summary judgment, dismissing a suit with prejudice, but without any trial or findings of fact, can have any collateral estoppel effect on a subsequent suit between the same parties, and based primarily on the same course of alleged unlawful conduct, but involving a new cause of action.

STATUTES INVOLVED

This case involves section 1 and 2 of the Sherman Act, 26 Stat. 209 (15 U.S.C. sections 1 and 1); and sections 4 and 16 of the Clayton Act, 38 Stat. 731 and 737 (15 U.S.C. sections 15 and 26). These are reproduced in pertinent part in Appendix E, *infra.* P. 64.

STATEMENT OF THE CASE

This is an action by Petitioner for treble damages and injunctive relief for alleged violation of sections 1 and 2 of the Sherman Antitrust Act. The action was commenced in the United States District Court for the Eastern District of Louisiana under sections 4 and 16 of the Clayton Act, upon which jurisdiction of the said District Court is based (See Appendix E, *infra.* P. 64).

The Facts

The operative facts in this case are substantially the same as the facts stated in the opinion delivered by this Court in

the case of *Lawlor v. National Screen Service Corp.*, 349 322 (1955). They may be briefly summarized as follows.

Petitioner is a jobber engaged in the business of servicing motion picture theatre operators ("exhibitors") with supplies of advertising posters, known in the trade as "standard accessories."

Petitioner is a localized jobber doing business only in the New Orleans, Louisiana, motion picture district.

One of the Respondents (National Screen Service Corporation ("National Screen") is engaged in the same business as petitioner, but on a national scale, and therefore it competes with Petitioner in the New Orleans area.

The other seven Respondents are major American motion picture producers ("Producers") who produce also the standard accessories.

Standard accessories embody copyrighted matter from the pictures being advertised, and therefore they may be said to be a very special kind of poster.

Prior to the year 1941 Petitioner was able to obtain supplies of standard accessories by buying them from the producers.

Petitioner alleges, however, that during the 1940's each of the seven producers entered into an expressly exclusive

license agreement with National Screen with the intent - and with the result - of making it impossible for any poster distributor other than National Screen to obtain adequate supplies of standard accessories from any source within the United States.

Petitioner also alleges that these agreements required National Screen to pay a substantial share of its profits to the producers.

Petitioner also alleges that in 1943 National Screen, in order to avoid litigation, agreed to - and did begin to - sell supplies of standard accessories to Petitioner, but that on May 16, 1961, National Screen discontinued this practice.

History of the Case

The instant suit, Civil Action 67-1160, is the third treble-damage suit commenced by Petitioner against National Screen and the seven Producers[1] primarily on the basis of the aforesaid exclusive license agreements.

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1. There were some differences in these suits with respect to the number of producers named as defendants, but all such differences are immaterial for present purposes. As a practical matter, it may be assumed that parties in all three suits are identical.

Suit No. 1
(Civil Action 11145)

Petitioner's first suit was commenced on May 17, 1961, following National Screen's discontinuance of the practice of making supplies of standard accessories available to Petitioner and other competitors.

The complaint charged the Respondents, in substance and effect, with operating a continuing conspiratorial monopoly, and claimed damages for loss of income suffered prior to commencement of the suit but not thereafter.

On July 26, 1961, the district court, without any trial or findings of fact, entered summary judgments dismissing this suit with prejudice with respect to the Producers only.

No judgment was entered for National Screen at that time because that defendant had not moved for summary judgment; but, as will be seen, that fact is immaterial for present purposes. Petitioner concedes that the judgments entered were made final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure and petitioner did not appeal. The fact is, however, that the suit remained open for a time with respect to National Screen only.

Suit No. 2
(Civil Action 15125)

On November 30, 1964, Petitioner commenced a second

suit (C. A. 15125) against both National Screen and the Producers.

This suit was substantially the same as the first suit except only that the damages claimed were only for losses of income suffered as a result of restraints imposed during the period of time intervening between the dates of commencement of the two suits, viz: from May 17, 1961 to November 30, 1964.

On motion made, the court consolidated suit No. 1 with suit No. 2, and all of the defendants (National Screen as well as the producers) moved for summary judgment; and on June 16, 1965, the court entered a final summary judgment dismissing both suit No. 1 and suit No. 2 with prejudice. There was no trial and no findings of fact.

And once again, Petitioner did not appeal.

Suit No. 3.
(Civil Action 671160)

Petitioner's third suit - the instant suit - (C. A. 67-1160) was commenced on August 11, 1967.

It was in all respects substantially the same as the preceding suits except that damages were claimed only for losses suffered as a result of restraints imposed subsequent to the date of filing of suit No. 2 - viz: subsequent to November 30, 1964.

There have been two appeals taken by Petitioner in this case, the reasons for which are as follows.

The First Appeal

On July 8, 1968, the district court dismissed this suit by entering a summary judgment based on the supposed res judicata-collateral estoppel effect of the summary judgments entered in the two preceding suits.

Petitioner took an appeal, and on January 26, 1970, the Court of Appeals (the court below) reversed the judgment and remanded the case for trial on the merits: *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F. 2d 1313 (1970) cert. den. 400 U.S. 991 (1970).

More fully, by way of preliminary summary, the Court of Appeals said (421 F. 2d at 1316):

> "Our attempt to carve our way through these doctrines and this litigation convinces us that the District Court erred. Although res judicata and collateral estoppel do slice away much, there are still controverted issues upon which Exhibitors may recover if it can meet its considerable burden of proof."

And the Court concluded its opinion by saying (421 F. 2d at 1321):

> "The burden may be a heavy one, but Exhibitors is entitled to attempt to bear it. We thus must remand the case to the District Court. . .
>
> "Reversed and remanded."

The Second Appeal

Instead of proceeding to try the case, however, the district court, on December 28, 1973,[2] dismissed it a second time on substantially the same record, and on the same grounds as before (res judicata-collateral estoppel) plus the statute of limitations.

Petitioner again appealed, and on August 8, 1975, the court below entered a judgment of affirmance on the ground of collateral estoppel alone, the court stating that it did not reach the other two grounds, 571 F. 2d at 114, Appendix A, *infra.* at P. 32).

This petition for certiorari is a petition for a review of that judgment.

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2. In the meantime, on August 10, 1971, a fourth suit (C.A. 712222) was commenced. The only purpose and effect of this suit was to bring down to date the claim for damages made in C.A. 671160. On December 26, 1972, the two suits were ordered consolidated.

REASONS FOR GRANTING THE WRIT

It is submitted that the judgment entered by the court below is in direct conflict with the decision of this Court in the case of *Lawlor v. National Screen Service Corp.*, 349 U. S. 322 (1955), *supra*.

That is to say, in that case the operative facts, the parties defendant, and the questions involved were substantially the same as in this case, and this Court held that neither res judicata nor collateral estoppel was applicable.

More fully, in the *Lawlor* case the plaintiff-petitioner was a localized poster distributor doing business in the Philadelphia area. He commenced two suits, both of which were based primarily on the aforesaid exclusive license agreements. The first suit was commenced in 1943, and it was terminated by entry of a consent judgment of dismissal with prejudice, without any trial or findings of fact. The second suit was commenced in 1949. In this second suit the plaintiff - Lawlor - alleged a continuing conspiracy, and claimed damages only for losses of income suffered subsequent to the period of time involved in the first suit. Otherwise, there was no substantial difference between the two suits. The defendants moved for summary judgment on the ground of the supposed res judicata-collateral estoppel effect of the 1943 judgment and the District Court entered the judgment. On appeal, the Court of Appeals for the Third Circuit rejected collateral estoppel but sustained res judicata. Certiorari was granted and this Court unanimously held that neither res judicata nor collateral estoppel was applicable. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), *supra*.

More specifically, this Court held (1) that res judicata was inapplicable because the second suit involved a different damage period and therefore was based on a cause of action different from that in the first suit; and (2) that collateral estoppel was inapplicable because there had been no trial, and consequently no findings of fact.

More fully, this Court said (349 U.S. at 326-328, footnotes omitted):

> "The basic distinction between the doctrines of res judicata and collateral estoppel, as those terms are used in this case, has frequently been emphasized. Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit. Recognizing this distinction, the court below concluded that 'No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding there-

after.' Turning then to the doctrine of res judicata, the court correctly stated the question before it as 'whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942 and lost.' The court answered the question in the affirmative on the ground that the two suits were based on 'essentially the same course of wrongful conduct.'

* * *

"It is of course true that the 1943 judgment dismissing the previous suit 'with prejudice' bars a later suit on the same cause of action. It is likewise true that the judgment was unaccompanied by findings and hence did not bind the parties on any issue -- such as the legality of the exclusive license agreements or their effect on petitioners' business -- which might arise in connection with another cause of action. To this extent we are in accord with the decision below. We believe, however, that the court erred in concluding that the 1942 and 1949 suits were based on the same cause of action.

"That both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct -- for example, an abatable nuisance -- may frequently give rise

> to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. . ."

This Court stated that certiorari was granted because of the importance of the questions presented " in the enforcement of the federal antitrust laws" (349 U.S. at p. 326).

It is submitted that as put today the same questions are of vastly increased importance because of the very strange failure of the court below to be guided by this Court's *Lawlor* decision.

The opinion written by the court below contains a very brief reference (of about ten lines) to this Court's decision in *Lawlor,* but nothing is said about the question of whether or not *Lawlor* controls this case.

This is all the more remarkable in view of the fact that in an opinion written by the court below in another case - decided about fifteen months prior to the decision in this case - the court said (*American Heritage Life Ins. Co. v. Heritage Life Ins. Co.,* 494 3d 3, 8 (Cir. 5, 1974):

> "In Lawlor, the Supreme Court held that a judgment dismissing a suit with prejudice constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial and bars a later suit between the same parties on the same cause of action. But the Court noted that where the judgment is

> not accompanied by findings, the judgment does not bind the parties on any issue which might arise in connection with another cause of action. Lawlor v. National Screen Service Corp., supra, 75 S. Ct. at 868. [349 U.S. at 327]. Thus, such a judgment has only the most limited res judicata and collateral estoppel effect."

In a petition for a rehearing en banc petitioner called attention to this conflict in the court's decisions respecting the *Lawlor* case but rehearing was denied without comment. (Appendix D, *infra.* P. 63).

Finally, it should be noted that in the *Lawlor* opinion this Court took care to point out that any different result would have the effect of conferring on the defendants a partial immunity from civil liability for future violations of the antitrust laws.

Specifically, the Court said (349 U.S. at 329):

> "Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from a civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata."

Now the striking fact is that one of the respondents herein - National Screen - has actually been tried, in a companion

case, in the City of Atlanta, Georgia, and was found guilty - on the same facts - of operating an illegal monopoly, as a result of which judgment was entered against that respondent in the amount of $450,000; and in affirming that judgment the Court of Appeals (the court below, with a different panel of judges then sitting) saw fit to describe the conduct of the defendant as "grossly predatory": *Poster Exchange, Inc. v. National Screen Service Corp.,* 431 F. 2d 334, 341 (Cir. 5, 1970), cert. den., 401 U.S. 912; Rehearing den. 401 U. S. 1015.

In the opinion filed in this case the court below commented on this inconsistency in its decisions as follows (517 F. 2d at 116; Appendix A, *infra* P. 32).

> "In conclusion, we note that the net result of our holding here - finding Exhibitors estopped from proceeding against defendant National Screen - appears in some ways at odds with the adjudication affirmed in the Atlanta image of this litigation, which held National Screen responsible for antitrust abuses against Exhibitors' Atlanta counterpart. See Poster Exchange, Inc. v. National Screen Corp., 5 Cir. 1970, 431 F.2d 334. If such an inconsistency exists, we are unable to remedy it in this proceeding. . . . ."

This "inconsistency" was one of the grounds relied on in petitioner's petition for a rehearing en banc, which, as aforesaid, the court denied without comment. (Appendix D, *infra.*

P. 63).

In the opinion below the court seems to assume that a summary judgment has the same estoppel effect as a judgment entered after the trial of a case.

For instance, the court says that (571 F. 2d at 114, Appendix A, *infra.* P. 32).

> "The judgment entered by the district courts in Suits 1 and 2 established that the activities of Producers and National Screen did not amount to a §1 conspiracy and that National Screen had not monopolized or attempted to monopolize the industry in derogation of §2."

It is submitted that a summary judgment-motion judge has no power so to decide the merits of a case.

Again the court says that (571 F. 2d at 114; Appendix A, *infra.* P. 32).

> "In this lawsuit, Exhibitors complains of conduct identical to that on which it has once litigated and lost . . ." (emphasis added)

It is submitted that the court misapprehends the meaning of the word "litigated."

In *Cromwell v. County of Sac,* 94 U.S. 351 (1877), this

Court, in substance and effect, said that to litigate a question is to reach a determination by way of a "finding or verdict" (94 U. S. at 353).

And in the Restatement of Judgments, sec. 68, comment c, the term "actually litigated" is defined as follows:

> "c. *Where a question of fact is actually litigated.* Where a question of fact is put in issue by the pleadings and is submitted to the jury or other trier of facts for its determination, and it is determined, the question of fact is actually litigated, and the judgment is conclusive between the parties in a subsequent action on a different cause of action."

Finally, in this connection,it is noted that head note 3 of the official report of this case (571 F. 2d at 111) reads as follows:

> "3. Judgment
>
> Doctrine of collateral estoppel was no less available because judgment out of which estoppel assertedly arose was summary judgment entered without specific factual findings, rather than judgment entered after trial of contested facts."

It is submitted that that statement of the law is contrary

to the many cases decided by this Court following *Cromwell v. County of Sac*, 94 U. S. 351 (1877), *supra*.

SUMMARY

This Court has said that:

> ". . . the purpose of the [summary judgment] rule is not to cut litigants off from their right of trial by jury if they really have issues to try."[3]

The fact that this Petitioner really has issues to try is well established by the fact that when, a few years ago, a companion case was actually tried in the City of Atlanta the plaintiff won a money judgment of $450,000, which the court below affirmed.[4]

It does indeed, therefore, seem very clear that this is a significant antitrust suit and that it should be subjected to trial by jury.

Of even greater significance, however, is the fact that the court below saw fit to dismiss this case by entering summary judgment without any discussion of (and therefore apparently without any consideration of) the question whether or

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3. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 468.

4. *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F. 2d 334 (1970) cert. den. 401 U.S. 912 (1971) rehearing den. 401 U.S. 1015, *supra*.

not this Court's opinion in the *Lawlor* case,[5] controls this case.

CONCLUSION

For the reasons aforestated it is submitted that this petition for issuance of a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on August 8, 1975, should be granted.

Respectfully submitted,

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---

5. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955) *supra*.

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1975

NO.

THE POSTER EXCHANGE, INC.,
Petitioner

versus

COLUMBIA PICTURES CORP., METRO-GOLDWYN-MAYER, INC., PARAMOUNT FILM DISTRIBUTING CORP., TWENTIETH CENTURY-FOX FILM CORP., UNITED ARTISTS CORPORATION; WARNER BROTHERS DISTRIBUTING CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

The Petitioner herein, The Poster Exchange, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on August 8, 1975.

The operative facts and questions involved in this case are the same as those in the preceding petition filed by

Exhibitors Poster Exchange, Inc. The cases were argued together at the same time in the court below, and in the opinion filed in this case the court below stated, in substance and effect, that the disposition of this case is ". . . controlled by our decision today in Exhibitors Poster Exchange, Inc." (See Appendix F *infra* at p. 66 , 517 F2d at p. 122, first paragraph).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F. 2d 117, and is reproduced at Appendix F, *infra* p. 66 . The Judgment of the Court of Appeals is reproduced at Appendix G, *infra.* p. 96 . The opinion of the United States District Court for the Eastern District of Louisiana is not reported; it is reproduced at Appendix H, *infra.* p. 98 .

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975, (Appendix G, *infra.* p. 96), and petitioner's timely application for an en banc rehearing was denied on September 24, 1975 (Appendix I, *infra.* p.113). This petition for certiorari is being filed less than 90 days from the date last abovementioned. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1

When successive antitrust suits are commenced to recover damages for losses of income caused by a continuing monopoly, is it not true that each suit involves a new cause of

action if in each suit the claim for damages is limited to losses suffered by the plaintiff as a result of restraints imposed subsequent to the date of commencement of the preceding suit?

2

Whether a summary judgment, dismissing a suit with prejudice, but without any trial or findings of fact, can have any collateral estoppel effect on a subsequent suit between the same parties, and based primarily on the same course of alleged unlawful conduct, but involving a new cause of action.

STATUTES INVOLVED

This case involves section 1 and 2 of the Sherman Act, 26 Stat. 209 (15 U.S.C. sections 1 and 2); and section 4 of the Clayton Act, 38 Stat. 731 (15 U.S.C. section 15). These are reproduced in pertinent part in Appendix E,*infra* p. 64.

STATEMENT OF THE CASE

This is an action by Petitioner for treble damages and injunctive relief for alleged violation of sections 1 and 2 of the Sherman Antitrust Act. The action was commenced in the United States District Court for the Eastern District of Louisiana under sections 4 and 16 of the Clayton Act, upon which jurisdiction of the said District Court is based (See Appendix E, *infra* p. 64).

The Facts

The operative facts in this case are substantially the same

as the facts stated in the opinion delivered by this Court in the case of *Lawlor v. National Screen Service Corp.*, 349 322 (1955). They may be briefly summarized as follows.

Petitioner is a jobber engaged in the business of servicing motion picture theatre operators ("exhibitors") with supplies of advertising posters, known in the trade as "standard accessories."

Petitioner is a localized jobber doing business only in the motion picture district of Atlanta, Georgia.

One of the Respondents, National Screen Service Corporation ("National Screen") is engaged in the same business as petitioner, but on a national scale, and therefore it competes with Petitioner in the area of Atlanta, Georgia.

The other six Respondents are major American motion picture producers ("Producers") who produce the standard accessories.

Standard accessories embody copyrighted matter from the pictures being advertised, and therefore they may be said to be a very special kind of poster.

Prior to the year 1941 Petitioner was able to obtain supplies of standard accessories by buying them from the producers.

Petitioner alleges, however, that during the 1940's each of the six producers entered into an expressly exclusive license agreement with National Screen with the intent - and with the result - of making it impossible for any poster distributor other than National Screen to obtain adequate

supplies of standard accessories from any source within the United States.

Petitioner also alleges that these agreements required National Screen to pay a substantial share of its profits to the producers.

Petitioner also alleges that in 1943 National Screen, in order to avoid litigation, agreed to - and did begin to - sell supplies of standard accessories to Petitioner, but that on May 16, 1961, National Screen discontinued this practice.

History of the Case

This suit (Civil Action 12497) is the second suit commenced by this petitioner primarily on the basis of the aforesaid exclusive license agreements.

Suit No. 1
(Civil Action 7665)

The first suit (Civil Action 7665) was commenced on July 17, 1961.

Originally National Screen was the only defendant named in that suit.

Subsequently, the complaint was amended so as to include five of the major film companies ("Producers") as parties defendant. The Producers thus joined were all of the six Producer Respondents named herein, except Columbia Pictures Corp ("Columbia").

Promptly thereafter, the Producers (but not National

Screen) filed a motion for summary judgment.

This motion was based on the supposed *stare decisis* effect of a case decided in a different Circuit, and involving a different plaintiff, named Lawlor.

On July 2, 1963, the court granted the motion for summary judgment.

The opinion of the court is reported at 35 F.R.D. 558 and is reproduced in Appendix J, *infra*, p. 114.

On Appeal, the judgment was affirmed per curiam, and this Court denied certiorari: *Poster Exchange, Inc. v. Paramount Film Dist. Corp.*, 340 F. 2d 320 (1965) cert. den. 381 U. S. 936.

Subsequently National Screen also moved for summary judgment on the same ground, and the district court granted the motion, and entered the judgment; but on appeal the judgment was reversed and the case was remanded for trial on the merits: *Poster Exchange, Inc. v. National Screen Service Corp.*, 363 F. 2d 571 (1966) cert. den. 385 U.S. 948.

Consequently, the case proceeded to trial against National Screen alone. The trial was to the court without a jury and resulted in the entry of a money judgment against National Screen in the amount of $150,000, trebled to $450,000.

On appeal, the judgment was affirmed: *Poster Exchange, Inc. v. National Screen Service Corp.*, 431 F. 2d 334 (1970), cert. den., 401 U.S. 912; Rehearing Den. 401 U.S. 1015.

Suit No. 2
(The Instant Suit)
(Civil Action 12497)

The instant suit was commenced on February 26, 1969, promptly after the entry of the aforesaid money judgment against National Screen.

In the complaint filed in this suit, the plaintiff claimed damages for losses of income suffered as a result of restraints imposed during the four year period prior to commencement of the suit.

Named as defendants were National Screen and the six Producers named as respondents in this proceeding, including Columbia - which, as aforesaid, was not named as a party in suit No. 1. (Civil Action 7665, *supra.*)

The first thing that happened in this case was that the district court dismissed it as to the Producers by entering summary judgment for them on the ground of the statute of limitations, but on appeal this judgment was reversed with a remand: *Poster Exchange, Inc. v. National Screen Service Corp.*, 456 F. 2d 662 (1972).

After remand, viz: on December 26, 1973, the district court dismissed the case a second time as to the Producers by entering summary judgment for them on the ground that the plaintiff (the Petitioner herein) was collaterally estopped by the summary judgment entered in favor of the Producers in Suit No. 1 (Civil Action 7665) as aforesaid.

Although Columbia was not a party in Civil Action 7665, the court held that that defendant also could benefit by the supposed collateral estoppel effect of the summary judgment entered in that action.

On appeal the court below entered a judgment of affirmance: (Appendix G, *infra*, p. 96) and this petition for certiorari is a petition for a review of that judgment.

Actually the opinion of the court below appears to be plainly self-contradictory with respect to Columbia.

For instance, in the forepart of the opinion, the court states that (517 F.2d at 119, Appendix F, *infra*, at p. 66):

> "We affirm as to all Producers except Columbia on grounds of collateral estoppel; we reverse as to Columbia, and remand for further proceedings with respect to the claim against it."

But later on in its opinion the court says (517 F.2d at 122, Appendix F, *infra*, at p. 66):

" [2,3] The summary judgment entered in the 1961 suit by necessity determined that upon the facts shown none of the Producer defendants had conspired unlawfully with Columbia. Columbia seeks here by that judgment to estop Poster from proceeding on its allegations that Columbia illegally conspired with the remaining Producers. We agree with the district court that collateral estoppel is correctly invoked here with respect to Columbia as well. Prior practice would not have recognized the estoppel here, for lack of mutuality, but as we recognized in Rachal v. Hill, 5 Cir. 1970, 435 F.2d 59, 61-62:

"' Although many states still honor the rule of mutuality of estoppel, the modern trend has been to discard the rule and preclude a party from relitigating an issue decided against him in a prior action, even if the party asserting the estoppel was a stranger to the prior action. . . . . The federal rule comports with the modern trend and thus it is clear that the requirements of mutuality need not be met for collateral estoppel to be applied in an action presenting a federal question in the courts of the United States.' "

It appears that what the court meant to do was to affirm in part and reverse in part with respect to Columbia, but this matter seems too unimportant to be labored further at this stage of this case.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ in this case are substantially the same as the reasons stated in the case of Exhibitors Poster Exchange, Inc.,*supra*, at p. 10 , et seq. As therein stated, petitioner contends that the decision below is in direct conflict with the decision of this Court in the case of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), *supra*.

CONCLUSION

For the reasons aforestated it is submitted that this petition for issuance of a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on August 8, 1975, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari have been served on Tench C. Coxe, 1400 Candler Building, Atlanta, Georgia, 30303; Phillip A. Wittman, 1000 Whitney Building, New Orleans, Louisiana 70130; Walter S. Beck, 40 West 57th Street, New York, New York, 10019; and Gibbons Burke, One Shell Square, New Orleans, La. 70139, this day of November, 1975.

C. ELLIS HENICAN, JR.

APPENDIX A
OPINION OF THE COURT BELOW
U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant,

v.

NATIONAL SCREEN SERVICE CORPORATION, et al.
Defendants-Appellees.

No. 74-1459

United States Court of Appeals,
Fifth Circuit.

Aug. 8, 1975.

An independent jobber in the motion picture accessory business brought an action against motion picture producers and an accessory company with whom they had contracted, alleging that defendants had conspired to restrain trade and monopolize the accessory industry and seeking treble damages and injunctive relief. After remand, 456 F.2d 662, the United States District Court for the Eastern District of Louisiana at New Orleans, Lansing L. Mitchell, J., entered summary judgment in favor of defendants on the basis of res judicata, collateral estoppel, and the statute of limita-

tions, and plaintiff appealed. The Court of Appeals, Goldberg, Circuit Judge, held that where, after summary judgment had been entered against it in a prior similar suit against the same defendants, plaintiff merely alleged, in a new suit filed thereafter, that the same antitrust conspiracy and monopoly had continued thereafter, the prior decision barred plaintiff from recovery under principles of collateral estoppel, and that this was true despite the fact that the prior action had been decided on motion for summary judgment, without specific factual findings having been made.

Affirmed.

Affirmed.

1. Judgment -- 600

Where, after judgments had been entered against motion picture accessory jobber in its prior actions against motion picture producers and accessory company in which jobber alleged that producers and accessory company conspired to monopolize market in motion picture accessories, jobber initiated additional suit against same defendants, seeking damages for the similar alleged conduct allegedly accruing in later periods, and where, in later suit, jobber alleged no different violations by defendants but claimed merely that prior antitrust conspiracy and monopoly had simply continued, later suit was barred under principles of collateral estoppel. Sherman Anti-Trust Act, § 1, 2, 15 U.S.C.A. §1, 2; Clayton Act, § 4, 15 U.S.C.A. § 15.

2. **Judgment -- 634**

Collateral estoppel bars plaintiff from assailing defendants for proceeding without change upon course of conduct previously held lawful against plaintiff's identical attack.

3. **Judgment -- 653**

Doctrine of collateral estoppel was no less available because judgment out of which estoppel assertedly arose was summary judgment entered without specific factual findings, rather than judgment entered after trial of contested facts.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

This antitrust case -- together with its judical cousins decided today, Poster Exchange, Inc. v. National Screen Corp., 5 Cir. 1975, ---F. 2d --- and Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1975.--- F. 2d --- has proceeded toward its culmination with

something less than the speed of light. These three case grow out of the consolidation of the motion picture accessory business, under the dominance of National Screen Service Corp. (National Screen), a development which has generated more than a score of judicial opinions in the Third and Fifth Circuits and the Supreme Court, and covered a span of more than thirty years.

The case at hand concerns the movie poster industry in New Orleans. Plaintiff Exhibitors Poster Exchange, Inc. (Exhibitors) charges in this suit that defendant National Screen and seven Movie production firms (Producers)[1] have combined to restrain free trade in movie posters in Exhibitors' market and to sustain a monopoly in the distribution of these posters for National Screen during the 1967-1971 period. We conclude that Exhibitors is collaterally estopped from proving its allegations by the effect of unappealed judgments against it in previous litigation against these defendants. In discussing the nature of the claim here alleged, we necessarily proceed to sketch the basic structure and history of the poster industry as it relates to all three cases resolved today.

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1. Columbia Pictures Corp., Metro-Goldwyn-Mayer, Inc. (M-G-M), Paramount Film Distributing Corp., Twentieth Century-Fox Film Corp., United Artists Corporation, Universal Films Exchanges, Inc., Warner Brothers Distributing Corp.

I

Nearly all motion picture operators employ posters, or accessories, depicting copyrighted scenes from the films to advertise and promote their current and anticipated features, and such posters have been in use since early in the history of the motion picture industry. These posters were originally sold by the motion picture producers to theater operators; but in the Thirties, localized jobbers went into the business of acquiring an inventory of these posters and then renting them out for use and re-use by theater operators in the vicinity. The poster renting business flourished, and by 1940, independent poster renters were established throughout the United States. Plaintiff Exhibitors joined the industry in 1939 in New Orleans.

Early in the 1940's three of the motion picture producers, Paramount, R.K.O. and M-G-M, each contracted with defendant National Screen regarding the production and nationwide distribution of their standard posters, thus apparently cutting off independent poster renters from access to new supplies of accessories for films produced by those companies. In response, a band of thirteen independents instituted an antitrust action in the Eastern District of Pennsylvania [2] against National Screen, Paramount, R.K.O., and M-G-M, which ended in a compromise settlement providing that National Screen would grant each plaintiff a license

2. Allied Poster Corp. v. National Screen Service Corp., Civil No. 2472 (E.D. Pa. 1942.)

entitling it to purchase all necessary supplies of those producers' accessories (and the accessories of any other producers who might later contract similarly with National Screen) at specified prices. Subsequently National Screen entered into similar exclusive [3] contracts with the remaining five major film producers, Universal, Columbia, United Artists, Warner, and Fox; and a second suit was instituted in the federal district court in Philadelphia, this time against National Screen and all eight major producers. After winning a Supreme Court judgment that their present cause of action was not barred by res judicata because of its continuation after 1943, and because of the enlargement in scope of acts and defendants, Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122, the independent-plaintiffs were ultimately defeated on the merits. Lawlor v. National Screen Service Corp., 3 Cir. 1959, 270 F.2d 146, cert. denied 1960, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed. 2d 742. Braced by this Third Circuit decision in its favor, National Screen proceeded in February, 1961, to notify Exhibitors and other jobbers throughout the country of its intention to discontinue supplying accessories to

3. The contracts between Producers and National Screen have since been replaced by (at least nominally) non-exclusive agreements. Cf. the Consent Decree entered in United States v. National Screen Service Corp., 1957 CCH Trade Cases 68,670.

Exhibitors (as it had been supplying them since 1943) and the other jobbers as of May 16, 1961.

The day after the cut-off, May 17, 1961, Exhibitors initiated suit (Suit 1) against National Screen and six of the seven producers[4] here charged, alleging violations of Sherman Act, ¶ 1[5] and 2[6] through a conspiracy to restrain trade and to give National Screen a monopoly, and through National Screen's alleged monopolization and attempt to monopolize the accessory industry. Exhibitors sought treble damages and injunctive relief.[7] Exhibitors initially garnered a preliminary injunction against all defendants, but the injunction was dissolved following discovery, and summary judgment was entered in favor of the Producers. Plaintiffs took no appeal.

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4. Columbia was not a party.

5. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

6. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor

. . . .

7. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

National Screen remained as a party defendant in Suit 1. As trial approached, Exhibitors filed a second suit in 1964 (Suit 2) against National Screen and all Producers[8] to recover damages suffered since the entry of summary judgment in Suit 1 in 1961. Trial on the remaining aspects of Suit 1 was postponed, and the two suits were merged. Subsequently, in 1965, the district court entered summary judgment for each of the defendants. Again, Exhibitors took no appeal.

Undeterred, Exhibitors filed Suit 3 in 1967 against National Screen and the seven producers, asking for damages from the time of filing Suit 2. The district court entered summary judgment for each defendant on the basis of res judicata and collateral estoppel, and Exhibitors appealed. Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1970, 421 F. 2d 1313, cert. denied, 400 U.S. 991, 91 S.Ct. 454, 27 L.Ed. 2d 439. Lending an indulgent reading to Exhibitors' pleadings in Suit 3[9] we concluded that they could be read to allege new claims based on significant post-1961 actions, and that res judicata did not entitle the defendants to summary judgment on that record. We observed further, however,

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8. Including Columbia.

9. See Conley v. Gibson, 1957, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80.

[a]lthough No. 3 would be a new cause of action and res judicata inapplicable thereto, Exhibitors might still be barred from further action on certain issues by collateral estoppel. The doctrine is classically stated by Mr. Justice Field in Cromwell v. County of Sac, 1877, 94 U.S. 351, 24 L.Ed. 195 when he says that in 'a second action between the same parties *** upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' at 94 U.S. 353, 24 L.Ed. 198. It forecloses inquiry only as to those issues which were necessarily determined. United States v. Burch, 5 Cir. 1961, 294 F. 2d 1, 5.

Thus it is necessary to determine what were the 'matters in issue or points controverted' in Suits No. 1 and No. 2. This determination is to be made on the basis of the prior records. The process was generally described by Mr.Justice Day: 'To answer these questions, we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy.' United Shoe Machinery Corp. v. United States, 1922, 258 U.S. 451, 459, 42 S. Ct. 363, 366, 66 L.Ed. 708, 718.

421 F.2d at 1319.
We then proceeded to identify the issues determined in Suits 1 and 3, and thereby precluded from re-litigation in Suit 3, as including the lawfullness under §§1 and 2 of the Sherman Act of the defendants' 1961 activities. Concluding, however, that Exhibitor's pleadings might be interpreted to encompass new actions beyond th ose charged in the earlier suits, we remanded the case to allow Exhibitors an opportunity to prove such subsequent substantive antitrust violations.

On remand Exhibitors offered to prove only that the alleged antitrust behavior of which it has complained since 1961 -- National Screen's consolidation of the industry, refusal to deal with Exhibitors, and exclusive dealing with Producers -- has continued throughout the period sued upon[10] Exhibitors has not alleged any new and different activities or agreements by or between the defendants, or any new and different disruption of plaintiff's business. On the contrary, its position, as stated to the district court, was that the defendants "are not doing anything different from what they've done before. There is nothing different after 1961 . . . .." On this record, the district court denied Exhibitors a preliminary injunction in 1970, which denial we affirmed, Exhibitors Poster Exchange v. National Screen

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10. Exhibitors initiated Suit 4 against National Screen and all seven producers in 1971 "to bring down to date the claim for damages made [in Suit 3]." That suit was merged with No. 3 in 1972. RKO Radio Pictures was added as a party defendant in Suit 4, but was never served.

Service Corp., 5 Cir. 1971, 441 F.2d 560, and ultimately again entered summary judgment in favor of the defendants on the basis of res judicata, collateral estoppel, and the statute of limitations. We conclude that summary judgment was properly granted on the basis of collateral estoppel, and do not reach the alternative grounds.

II

[1,2] The judgment entered by the district courts in Suits 1 and 2 established that the activities of Producers and National Screen did not amount to a § 1 conspiracy and that National Screen had not monopolized or attempted to monopolize the industry in derogation of § 2. In this lawsuit Exhibitors complains of conduct identical to that on which it has once litigated and lost, the continuance of the defendants in conduct already declared lawful. As Exhibitors admits in its brief, it alleges that the antitrust conspiracy and monopoly of which it complains "became complete" on May 16, 1961, and that the defendants' post-1961 conduct has simply continued violations without any alteration in their nature. We think it clear that under the collateral estoppel principles recognized in our previous opinion in this case,[11] the judgments in Suits 1 and 2 bar relitigation of the applicability of

11. Reiterated in Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1972, 456 F.2d 662, 665-66.

the identical antitrust principles[12] to this identical and inseparable conduct.

Collateral estoppel bars a plaintiff from assailing the defendants for proceeding without change upon a course of conduct previously held lawful against plaintiff's identical attack. *Accord* Scooper Dooper, Inc. v. Kraftco Corp., 3 Cir. 1974, 494 F.2d 840, 845-50; Vogelstein v. National Screen Service Corp., E.D. Pa. 1962, 204 F.Supp. 591-595, aff'd per curiam, 3 Cir., 310 F.2d 738, cert. denied, 1963, 374 U.S. 840, 83 S.Ct. 1894, 10 L.Ed. 2d 1061; United States v. General Electric Co., S.D.N.Y. 1973, 358 F. Supp. 731, 742 n.11 (dictum); see 1B Moore's Federal Practice ¶ 0.448, at pp. 4238-39 (2d ed. 1974); see also Engelhardt v. Bell & Howell Co., 8 Cir. 1964, 327 F.2d 30, 35-36; North Counties Hydro-Electric Co. v. United States, 1957, 151 F. Supp. 322, 324, 138 Ct.Cl. 380.[13]

12. Plaintiffs point to no intervening changes in applicable law. See Commissioner v. Sunnen, 1948, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898. As our opinion affirming the district court's judgment of illegality of National Screen's Atlanta operations demonstrates, the antitrust principles offended by National Screen's conduct there were hardly novel. See Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1970, 431 F.2d 334.

13. Speaking in the analogous context of a tax suit depending upon the resolution of the legal significance of a recurring factual situation, where "[c]ollateral estoppel operates. . . to relieve the government and the taxpayer of 'redundant litigation of the identical question of the statute's application to the taxpayer's status,' the Supreme Court has recognized that "[a] taxpayer may secure a judicial determination of a particular

Otherwise, collateral estoppel would afford no peace to such as the defendants here, who pursue a continuing course of conduct once adjudged lawful. See Scooper Dooper, Inc. v. Kraftco Corp., *supra*, 494 F.2d at 846.

[3] Evidently recognizing the force of these principles, Exhibitors admits that "if it is assumed that all acts committed by defendants prior to 1961 are legal and lawful, plaintiff has no case and should be out of cour." Its sole contention regarding the application of collateral estoppel to defeat its present case is that the judgments rendered against it in Suits 1 and 2 cannot serve as the basis of an estoppel because they were entered upon a summary judgment without specific factual findings, rather than upon a trial of contested facts. But we rejected this contention in no uncertain terms in our 1970 opinion in this case:

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13. tax matter, a matter which may recur without substantial substantial variation for some years thereafter. But a subsequent modification of the *significant* facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposed." Commissioner v. Sunne, 333 U.S. 591, 599-600, 68 S. Ct. 715, 720, 92 L.Ed. 898, 906 (emphasis added). Thus, where a change in circumstances has rendered the facts in a tax adjudication materially different from those considered in connection with a prior year, collateral estoppel does not bar the second proceeding. See, e. g., Flato v. Commissioner, 5 Cir., 1957, 245 F.2d 413; Alexander v. Commissioner, 5 Cir. 1955, 224 F.2d 788. But we have made clear that even in such a changed situation, a conclusion that different tax consequences attach to the succeeding year must be premised upon a finding that changed facts truly distinguish the situation from the previous year, and that the subsequent year's different treatment cannot be based upon a mere reappraisal of the prior year's facts.

We reject out of hand the beguiling but superficial contention of Exhibitors that neither Suit No. 1 nor No. 2 can have any collateral estoppel effect because no summary judgment can have such effect. This is based on an overemphasis of two assertions: (l) a collateral estoppel results only from an actual decision of an issue and (2) a summary judgment results from a finding that there is no genuine issue as to any material fact.

It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence -- plaintiff's, defendant's or all -- of a directed verdict. Indeed, a more positive adjudication is hard to imagine. It is

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See Thomas v. Commissioner, 5 Cir. 1963, 324 F.2d 798. And where no intervening facts or law of consequence has changed, collateral estoppel has been held to preclude relitigation of identical tax matters arising in successive years. See, e.g. Weiszmann v. Commissioner, 10 Cir. 1973, 483 F.2d 817; Jones v. United States, 10 Cir. 1972, 466 F.2d 131; Southern Maryland Agricultural Assn'n v. United States, 1957, 147 F. Supp. 276, 137 Ct.Cl. 176; see also United States v. Russell Mfg. Co., 2 Cir. 1965, 349 F.2d 13, 18-19; McCall v. Commissioner, 4 Cir. 1963, 312 F.2d 699, 702-03; Stanback v. Commissioner, 4 Cir. 1959, 271 F.2d 514, 516 n.6. (In this connection we note that collateral estoppel is sparingly applied in tax matters, see United States v. Russell Mfg. Co., 2 Cir. 1965, 349 F.2d. 13, 19; Jones v. United States, 10 Cir. 1972, 466 F.2d 131, 133. Cf. United States v. Stone & Downer, 1927, 274 U.S. 225, 47 S.Ct. 616, 71 L.Ed. 1013).

determination that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' F. R. Civ. P. 56(c). And it most certainly encompasses ultimate facts of the kind here involved. The only enigma involved is determining which of one or more multiply decisive issues of fact the Court on Summary judgment determined was totally lacking in legal significance. If a claim requires elements 1, 2 and 3 for recovery, summary judgment is proper if 2 is missing. But this would not give to a summary judgment based thereon a perpetual cloak to forbid inquiry into 1 or 3, or both. This would distort the wholesome policy behind collateral estoppel.

421 F.2d at 1319. We then proceeded to a close examination of the records in Suits 1 and 3, to determine the precise questions there resolved; these judgments as we have already noted, were found clearly to hold in favor of the lawfulness of the defendant's pre-1961 actions. So much established, plaintiff Exhibitors is estopped from attempting to prove the alleged wrongfulness of the defendants' continuation of identical conduct during the period sued upon here; and the district court was correct in entering summary judgment for the defendants in this case.

In conclusion, we note that the net result of our holding here -- finding Exhibitors estopped from proceeding against defendant National Screen -- appears in some ways at odds with the adjudication affirmed in the Atlanta image of this

litigation, which held National Screen responsible for antitrust abuses against Exhibitors' Atlanta counterpart. See Poster Exchange, Inc. v. National Screen Services Corp., 5 Cir., 1970, 431 F.2d 334. If such an inconsistency exists, we are unable to remedy it in this proceeding. As we recognized in our 1970 opinion in this case, "whether rightly or wrongly" the district court determined in Suit 2 that National Screen had not monopolized or attempted to monopolize Exhibitors' market, and Exhibitors took no appeal from that decision. There is no suggestion of any intervening change of law since that adjudication in favor of National Screen;[14] nor is there any allegation of factual developments which could distinguish the present case against National Screen from that lost in 1965. See Thomas v. Commissioner, *supra*, 5 Cir. 1963, 324 F.2d 798. We are bound as fully in this case to adhere to collateral estoppel principles as we would be if no judgment had been rendered in the Atlanta litigation. Indeed, any other result would prejudice the defendants here who may have proceeded in reliance upon the verdict in Exhibitor's prior litigation.

To avoid the bar sinister of collateral estoppel, something

14. See note 12, *supra*, Moreover, at the time the district court in New Orleans gave National Screen a summary judgment in Suit 2 (in 1965) we had already made clear that the Third Circuit's determination as to National Screen's alleged antitrust behavior were not conclusive in the Atlanta litigation paralleling this suit. See National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F.2d 647. In that case we affirmed the Atlanta district court's grant of a preliminary injunction *against* National Screen and its refusal to grant National Screen a summary judgment.

significant must have been added. Re-run scenarios with no new projections write "finis" to the litigation. Old posters never seem to die, nor even fade away. Some cases must have a merciful death, and collateral estoppel provides the necessary lethality where the vital organs of litigation have exhausted themselves already. Here we see no new scenes, no new entrances or exits, simply a continuation of the same drama, which has been held unviolative of the antitrust laws.

The judgment appealed from is affirmed.

APPENDIX B

JUDGMENT ENTERED BY THE COURT BELOW

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1974

No. 74-1459
D.C. Docket Nos. CA 67-1160 "F" &
CA 71-2222 "F"

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant,
versus
NATIONAL SCREEN SERVICE CORPORATION, ET AL.
Defendants-Appelees.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

August 8, 1975

Issued as Mandate:

APPENDIX C

OPINION OF UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

NO. 67-1160
Section F

Minute Entry
Mitchell, J:

OPINION OF COURT

This is yet another chapter in the never-ending, continuing drama of anti-trust litigation involving advertising posters for the movie industry.[1]

The two southern strains of this litigation are the Atlanta[2] and New Orleans branches[3] which arose out of

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1. The most complete history of this industry is set out in *Lawlor v. National Screen Service Corp.,* 270 FS 146 (CS3-1959) cert. den. 362 US 922, 80 S.Ct. 676 (1960).

2. *Poster I, National Screen Serv. Corp. v. Poster Exchange, Inc.,* 198 FS 557 (ND Ga.) aff. 305 F2d 47 (CA5-1962); Poster II, *Poster Exchange, Inc. v. Paramount Film,* 35 FRD 558 (N.D. Ga.) aff. 340 F2d 320 (CA5-1965) Poster III, *Poster Exchange, Inc. v. National Screen,* 362 F2d 571 (CA5-1966); Poster V, *Poster Exchange, Inc. v. National Screen,* 431 F2d 334 (CA5-1970) cert. den., 401 US 912, 91 S.Ct. 880 (1971); Poster VI, *Poster Exchange, Inc. v. National Screen,* 306 FS 491 (ND Ga.) vac. &rem. 456 F2d 662 (CA5-1972).

3. Poster IV: *Exhibitors Poster Exchange v. National Screen Serv. Corp.,* 421 F2d 1313 (CA5-1970) rhr. den. 427 F2d. 710; cert. den. 400 US 991, 91 S. Ct. 454 (1971).

National Screen's refusal, on May 16, 1961, to supply standard accessories to poster-renter jobbers such as Exhibitors Poster Exchange, Inc.

This is the progeny of Poster IV, which the United States Court of Appeals for the Fifth Circuit reversed in part and remanded.[4] Although the history of this litigation is set forth in that opinion, to put the status of this matter in its proper perspective, a limited review of the New Orleans litigation is in order.

On or about February 15, 1961, defendant, National Screen Service Corporation[5] notified plaintiff, Exhibitors Poster Exchange, Inc.[6] that, effective May 16, 1961, it would no longer fill plaintiff's orders for standard motion picture advertising accessories. Accordingly, service was discontinued on May 16, 1961.

Suit 1 [7] began when, on May 7, 1961, Exhibitors filed suit in this district for injunctive relief and treble damages, alleging violations of Sections 1 and 2 of the Sherman Anti-Trust Act.[8] Named defendants were National Screen Service Corp; Allied Artists Corp.; Buena Vista Dist. Co.; Metro-Goldwyn Mayer, Inc.; Paramount Film Distributing Corp.; Twentieth Century Fox; United Artists; Universal Film and

4. Ibid.
5. Hereinafter referred to as National Screen.
6. Hereinafter referred to as Exhibitors.
7. Civil Action No. 11,145.
8. 15 USC 1 and 15 USC 2.

Warner Bros.[9] The thrust of plaintiff's complaint was that when National Screen on May 16, 1961, refused to deal with Exhibitors, defendants jointly engaged in a continuing conspiracy to restrain trade in, and attempted to monopolize the motion picture advertising accessory business.

The trial court granted summary judgment in favor of Producers, dismissing the suit as to them, but retained National Screen as a party defendant. No appeal was taken from that decision.

On November 30, 1964, as Suit 1 approached trial, Exhibitors filed suit 2[10] in this Court. Added to those defendants originally named in Suit 1 was Columbia Pictures. Suit 2 was based upon the same alleged anti-trust violations as Suit 1 but differed in that plaintiff only sought damages suffered after Suit 1 was filed.

Suits 1 and 2 were merged and, on motion of all defendants, the trial judge on June 16, 1965, granted summary judgment dismissing these suits. No appeal was taken from this decision. Thus, these judgments judicially determined that there was no conspiracy to give National Screen a monopoly in the manufacture and distribution of motion picture advertising posters in the New Orleans area. Thus the Court found for defendants, both on the issue of Section 1 conspiracy and the Section 2 issue of monopolization under the Sherman Act.

9. Hereinafter referred to as Producers.
10. Civil Action No. 15,125.

On August 11, 1967, instant Suit (designated as Suit 3 or Poster IV) was filed against National Screen and seven of the major motion picture producers named as defendants in Suit 2. Suit 3 was based upon the same allegations as Suits 1 and 2, i.e., the 1961 refusal to deal, but differed in that plaintiff only sought damages suffered since Suit 2 was filed.

On June 21, 1968, we granted defendants motions for summary judgment, dismissing plaintiff's suit on the grounds that based upon the prior disposition of the conspiracy and monopolization claims of Suits 1 and 2, plaintiff's claim was barred by the application of *res judicata* and collateral estoppel.

On appeal, the United States Court of Appeals for the Fifth Circuit held that the summary dismissals of Suits 1 and 2 determined the legality of defendants conduct on and prior to May 16,1961, but reversed and remanded[11] to permit plaintiff to prove substantive anti-trust violations occurring post 1961.

Thereafter, on August 10, 1971, plaintiff filed suit 4[12] in this Court against National Screen and seven of the Producer-defendants sued in Suit 3.[13] Suit 4 is based upon the same 1961 refusal to deal, but again plaintiff only sought

11. 421 F2d 1313.
12. Dkt. No. 71-2222.
13. Although plaintiff added RKO as a party defendant, it was never served and no appearance ever entered on its behalf.

damages suffered since Suit 3 was filed. Suits 3 and 4 were consolidated on December 26, 1972.

Now before the Court are defendants motions for summary judgment, seeking dismissal of plaintiff's claims on the grounds that they are barred by the doctrine of *res judicata*, collateral estoppel and the statute of limitations.

The appellate Court, in Poster IV, or Suit 3, speaking through Chief Judge Brown held:

> "***Thus, the court, whether rightly or wrongly, necessarily determined judicially that the facts brought forth by deposition, pre-trial conferences, and other discovery devices, did not show either monopolization, attempted monopolization, or conspiracy on the part of National Screen under Secs. 1, 2 or both. But all was with respect to actions done or not done in 1961.
>
> * * *
>
> "Left open, however, are actions, if any, which may be established by proof covering *post* 1961 activities (or non actions) which substantively are violations of the anti-trust laws and the resulting damages therefrom occurring subsequent to the cut off date of Suit No. 2.
>
> "The burden may be a heavy one, but Exhibitors is

entitled to attempt to bear it. We thus must remand the case to the District Court. We do so, however, without even the slightest murmur of a suggestion as to how it will or should come out." (Emphasis supplied)

Thus one of the issues before this Court at this time is whether under this mandate, plaintiff has demonstrated that it might be able to prove any post 1961 action or non action by defendants.

After a careful review of the record, the admissions, briefs and other pleadings on file and admissions by counsel for plaintiff in pre-trial conferences and in open court, we conclude that the answer to that question is No.

Plaintiff has admitted in its answers to Request for Admissions that the facts constituting its case, insofar as proof of acts constituting anti-trust violations, all occurred before May 16, 1961.[14]

Counsel for plaintiff has repeatedly stated that the conspiracy and monopoly upon which it relies became complete on May 16, 1961, and that after that date defendants did not do or say anything different from what was said or done by them before that date.

At the hearing on this motion, counsel for plaintiff stated in open court that if it is assumed that all acts committed by defendants prior to 1961 are legal and lawful, plaintiff has no case and should be out of court.

14. See Vol II of the Record. Dec. 62.

The only overt acts attributable to defendants were those committed prior to, and which culminated with, the May 16, 1961, termination of plaintiff's supply of advertising accessories by National Screen.

Although plaintiff alleges that its business continues to be damaged, there have been no additional acts by defendants since the original refusal by National Screen to supply accessories.

In effect, what plaintiff contends is that all of the overt acts which violated the anti-trust laws were committed prior to May 16, 1961, but by continuing to do after that date what it did before that date, defendants have continuously violated the Sherman Anti-Trust Act and thus a new cause of action has accrued to plaintiff each and every day since May 16, 1961.

We disagree. What plaintiff has continued to overlook is the prior adjudication of Suite 1 and 2 holding that defendants were not engaged in an unlawful conspiracy, continuing or otherwise.

The issue presented in Suits 1 and 2 was whether defendants' pre May 16, 1961, conduct violated the anti-trust laws. That same issue is presented in Suits 3 and 4. Basic-

ally plaintiff claims the same rights, and charges the same wrongs, against defendants in Suite 1 and 2 that are charged in Suits 3 and 4. New claims are not being asserted against these defendants, merely the same old claims.[15]

Thus we conclude that Exhibitors claims in Suits 3 and 4 are precisely the same as they were in Suits 1 and 2, except for the period of time for which it seeks damages. Since plaintiff looks to pre-1961 conduct to prove its damages, and since that conduct has been judicially determined by Suits 1 and 2 to be neither monopolization, attempted monopolization or conspiracy, we conclude the pending actions are barred by the principle of *res judicata.*[16]

We further conclude that plaintiff is collaterally estopped from now litigating the question of whether defendants relationships and conduct pre May 16, 1961, violated the anti-trust laws.

Under the doctrine of collateral estoppel, facts found through litigation in any form are conclusive upon the parties

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15. See Chief Judge Brown's discussion in *Exhibitors Poster Exchange v. National Screen,* 421 F2d 1313 at pp. 1316 *et seq.*

16. *U. S. v. Moser,* 266 US 236, 45 S. Ct. 66 (1924); *Florasynth Laboratories, Inc. v. Goldberg,* 191 F2d 877 (CA7-1951); *F. L. Mendez & Co. v. General Motors Corp.,* 161 F2d 695 (CA7-1947) cert. den. 332 US 810, 68 S. Ct. 111 (1947); *U. S. v. Am. Honda Motor Co.,* 289 FS 277 (SD Ohio 1968).

in any subsequent litigation. Determination by a prior court that acts of defendants were not violative of the anti-trust laws is binding upon the parties in a subsequent action to have the same acts declared violative of these same laws.[17]

In addition, we conclude that plaintiff's claim is barred by the 4 year statute of limitations.[18]

The statute of limitations commences to run upon the commission of an act which is violative of the anti-trust laws and which causes injury to plaintiff's business. As to identification of the act constituting the cause of action, we agree with Judge Henderson in the companion case of The Poster Exchange, Inc. v. National Screen Service Corp., et al:[19]

"Examination of relevant judicial authority leads to the inescapable conclusion that this case can only fit within the classic "refusal to deal" mold. The characteristics of these cases were recently summed up by the Fifth Circuit Court of Appeals that:

Each...involved the termination of a course of dealing whereby the defendant supplier or manufacturer regularly furnished a distributor or dealer with a certain

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17. *Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Foundation,* 402 US 313, 91 S. Ct. 1434 (1971); *Singer v. A. Hollander & Son,* 202 F2d 55 (CA3-1953).

18. 15 USC 15b.

19. CA 12497 (ND Ga. Mem. Opinion rendered Dec. 12,1973.)

continuously available product for resale and where any subsequent refusal was merely a reiteration of the previous termination, in no way altering what had already been done.

Braun v. Berenson, 432 F.2d 538 (5th Cir. 1970). See also *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.,* 197 F. Supp. 333 (N.D. Ala. 1960). aff'd 295 F.2d 362 (5th Cir. 1961); *Emich Motors Corp. v. General Motors Corp.,* 229 F.2d 714 (7th Cir. 1956); *Garelick v. Goerlich's Inc.,* 323 F.2d 854 (6th Cir. 1963); cf *Crummer Co. v. DuPont,* 223 F. 2d 238 (5th Cir. 1955). In such a situation, the cause of action accrues with the single initial act of terminating a source of supply. Adherence to this once announced refusal to deal or subsequent refusals which merely reiterate the initial denial do not comprise new causes of action regardless of the fact that damages may continue to be incurred over a long period of time after the original termination. *Southeastern Hose, Inc. v. Imperial-Eastman Corp.,*____ F.Supp____ . Civil Action No. 12,608 (N.D. Ga. April 2, 1972)."

Let judgment be entered accordingly.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NOTICE OF APPEAL
(Filed: January 8, 1974)

EXHIBITORS POSTER EXCHANGE, INC.
VERSUS
NATIONAL SCREEN SERVICE CORPORATION, ET AL.

CIVIL ACTION
NO. 71-2222
SECTION "F"

CONSOLIDATED WITH

EXHIBITORS POSTER EXCHANGE, INC.
VERSUS
NATIONAL SCREEN SERVICE CORPORATION, ET AL"

CIVIL ACTION
NO. 67-1160
SECTION "F"

Notice is hereby given that Exhibitors Poster Exchange, Inc., plaintiff, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 28th day of December, 1973.

FRANCIS T. ANDERSON
829 St. Louis Street
New Orleans, Louisiana 70112
GLENN B. HESTER
Commerce Building
Augusta, Georgia 30902

s/ C. Ellis Henican, Jr.
C. ELLIS HENICAN, JR.

OF COUNSEL:

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APPENDIX D

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk
September 24, 1975

TO ALL COUNSEL OF RECORD

No. 74-1459 - Exhibitors Poster Exchange, Inc. vs.
National Screen Service Corp., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Clerk

By s/ Clare F. Sacks
Deputy Clerk

cc Mr. Glenn B. Hester
Mr. Frances T. Anderson
Mr. C. Ellis Henican, Jr.
Mr. Phillip A. Wittmann
Mr. Anthony M. DiLeo
Mr. Walter S. Beck

APPENDIX E

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sections 1 and 2:

Section 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with Foreign nations, is declared to be illegal. . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor,and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sections 4 and 16 of the Clayton Act, 28 Stat. 731 and 737, 15 U.S.C. Sections 15 and 26.

Section 4.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

APPENDIX F

OPINION OF COURT OF APPEALS

The Poster Exchange, Inc.,
Plaintiff-Appellant,
v.
National Screen Service Corporation et al.,
Defendants,
Columbia Pictures Corp. et al.,
Defendants-Appellees

No. 74-1512

United States Court of Appeals,
Fifth Circuit
Aug. 8, 1975

A motion picture accessories jobber instituted an action against motion picture producers and an accessories seeking to recover treble damages because of defendants' alleged unlawful antitrust conspiracy, attempted monopoly, and monopoly of the motion picture accessory industry. The United States District Court for the North District of Georgia, at Atlanta, Albert J. Henderson, Jr., J., granted the producers summary judgment on grounds of collateral estoppel and limitations, and plaintiff appealed. The Court of Appeals, Goldberg, Circuit Judge, held, inter alia, that the district court's collateral estoppel holding was correct; that collateral estoppel also applied in favor of a producer who had not been a party in the prior suit; and that the statute

of limitations did not bar plaintiff's claim against defendants' allegedly continuing antitrust conspiracy.

Affirmed in part and vacated and remanded in part.

1. Judgment

Where, after judgments have been entered against motion picture accessory jobber in its prior actions against motion picture producers and accessory company in which jobber alleged that producers and accessory company conspired to monopolize market in motion picture accessories, jobber initiated additional suit against same defendants, seeking damages for similar alleged conduct allegedly accruing in later periods, and where, in later suit, jobber alleged no different violations by defendants but claimed merely that prior antitrust conspiracy and monopoly had simply continued, later suit was barred under principles of collateral estoppel. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4A, 4B, 15 U.S.C.A. §§ 15, 15a, 15b.

2. Judgment

Where, in antitrust action by movie accessories jobber against movie producers, jobber had initiative in recognizably substantial litigation and specifically chose to cite one producer as one of alleged conspirators, although it failed to join that producer as party defendant, and where there was no suggestion of any failure to fairness in the litigation, judg-

ment in favor of producers in that litigation gave rise to collateral estoppel which prevented jobber from recovering against previously nonjoined producer in subsequent litigation in which identical unlawful conduct was alleged. Sherman Anti-trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4A, 4B, 15 U.S.C.A. §§ 15, 15a, 15b.

3. **Judgment**

Where mutuality is lacking, plaintiff may now be collaterally estopped if he did not enjoy fair opportunity procedurally, substantively, and evidentially to pursue his claim the first time.

4. **Judgment**

Doctrine of collateral estoppel did not prevent plaintiff from asserting claim which, although advanced in prior litigation, had not been disposed of by judgment therein.

5. **Monopolies**

Where, in treble damage antitrust action by motion picture accessories jobber against motion picture producers and accessories company, jobber alleged continuing conspiracy and monopoly interfering with its ability to supply itself with advertising accessories, jobber was entitled to recover damages accruing during four-year period preceding institution of suit, even though conspiracy was initiated by defendants previous to such four-year period. Sherman Anti-trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4A, 4B, 15 U.S.C.A. §§15, 15a, 15b.

6. **Limitation of Acts**

For statute of limitations purposes, new cause of action against antitrust conspiracy arises from each act in violation of antitrust laws for damages flowing therefrom. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4A, 4B, 15 U.S.C.A. §§15, 15a, 15b.

7. **Limitation of Acts**

Where antitrust violation is final at its impact, as where plaintiff's business is immediately and permanently destroyed or where actionable wrong is by its nature permanent at initiation without further acts, then acts causing damage are unrepeated and suit must be brought within limitations period and upon initial act. Sherman Anti-Trust Act §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§4, 4A, 4B, 15 U.S.C.A. §§ 15, 15a, 15b.

8. **Limitation of Actions**

Newly-accruing claim for antitrust damages must be based on some injurious act actually occurring during limitations period, not merely on abatable but unabated initial consequences of some prelimitations action. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4A, 4B, 15 U.S.C.A. §§15, 15a, 15b.

9. **Courts**

Where, in antitrust treble damage action by motion picture accessories jobber against motion picture producer and

others for alleged monopolization of motion picture accessories market, trial court had not determined whether there was, during limitations period, mere absence of dealing by defendants with jobber or whether, instead, there was some specific act or word precluding jobber from gaining access to producers posters for distribution during statutory period, district court having been of erroneous opinion that cause of action arose in neither case, action would be remanded for proceedings to clarify such issue. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 4A, 4B, 15 U.S.C.A. §§ 15, 15a, 15b.

. . . . . .

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge:

This case evolves from the same industry and raises, among others, the same issues decided today in Exhibitors Poster Exchange, Inc. v. National Screen Services Corp., 5 Cir.,----F.2d -----, No. 74-1459 and Poster Exchange, Inc. v. National Screen Services Corp., 5 Cir., ---F.2d----. No. 74-2172, also decided today. Plaintiff here, The Poster Exchange Inc., (Poster), an Atlanta-based

poster renter, initiated this treble damage suit[1] on February 26, 1969, in the Northern District of Georgia against National Screen Service Corp. (National Screen) and six motion picture producers (Producers)[2] charging their continuation of an unlawful antitrust conspiracy, attempted monopoly, and monopoly, in the motion picture accessory industry in derogation of Sherman Act §§ 1[3] and 2[4]. In December, 1973, the district court below granted the Producers (but not National Screen) a summary [5] judgment on grounds of collateral estoppel and limitations. Poster appeals.

We affirm as to all Producers except Columbia on grounds of collateral estoppel; we reverse as to Columbia, and remand for further proceedings with respect to the claim against it.

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1. Pursuant to 15 U.S.C. § 15, note 19 *infra*

2. Columbia Pictures Corporation, Metro Goldwyn Mayer, Inc., Paramount Film Distributing Corp., Twentieth Century Fox Film Corp., United Artists Corp., and Warner Brothers Pictures Distributing Corporation. Loew's Incorporated and Universal Film Exchange, Inc. are no longer defendants herein.

3. 15 U.S.C. § 1:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

4. 15 U.S.C. § 2:
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States,or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

5. National Screen was subsequently awarded summary judgment, the appeal from which we resolve today in No. 74-2172.

I

The industry here is the same as that described in No. 74-1459, but ever since 1943 plaintiff Poster has encountered rougher treatment from National Screen than has its counterpart in New Orleans. After settlement of the first motion picture accessory suit, in Philadelphia in 1943, National Screen granted Exhibitors in New Orleans a sublicense to distribute posters manufactured by National Screen; but, despite repeated requests, plaintiff Poster in Atlanta was afforded no such license. After entering the Atlanta Exchange Market, National Screen did supply Poster with accessories to some extent, until 1961, but these provisions were not sufficient to meet Poster's needs in supplying all of its own customers, and the prices to Poster were substantially higher than those to other independent poster renters. Finally, on May 16, 1961, Poster was cut off entirely from National Screen's posters.

In response, Poster sued National Screen in the Northern District of Georgia in 1961, charging National Screen with violations of § 2 of the Sherman Act and praying for treble damages and injunctive relief. The district Court denied National Screen's motion for a summary judgment in its favor, and awarded a preliminary injunction. Poster Exchange, Inc. v. National Screen Service Corp., N.D. Ga. 1961, 198 F. Supp. 557. On appeal we affirmed, 5 Cir. 1962, 305 F.2d 647, holding in particular that the outcome of the Philadelphia-based litigation of Lawlor v. National Screen Service Corp., 3 Cir. 1959, 270 F.2d 146, cert. denied, 1960, 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed. 2d 742, in

Philadelphia was not conclusive in this case.

Poster subsequently filed an amended complaint adding all of the Producers presently charged, save Columbia, as parties defendant. As amended, the Complaint recited that each of the Producers, *including* Columbia, had contracted with National Screen regarding the production and distribution of its accessories, and alleged that the arrangements "were entered into pursuant to and in furtherance of a conspiratorial plan or scheme deliberately concerned and launched by the parties thereto for the purpose of creating a national monopoly of distributing standard accessories." The Producers moved for summary judgment, which was granted by the district court in 1963. Poster Exchange, Inc. v. National Screen Service Corp., N.D. Ga. 1963, 35 F. R. D. 558. In granting judgment, the district court found no genuine issue as to any material facts, and relying on the *Lawlor* case as *stare decisis*, concluded that upon the facts asserted by Poster, the Producers were entitled to judgment as a matter of law. Poster appealed, and we affirmed per curiam *sub nom.* Poster Exchange, Inc. v. Paramount Film Distributing Corp., 5 Cir. 1965, 340 F. 2d 320.[6]

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6. Poster contends here that the district court's 1963 summary judgment in favor of the Producers was based on some erroneous application of the *Lawlor* decision and Vogelstein v. National Screen Service Corp., E.D. Pa. 1962, 204 F. Supp. 591, for collateral estoppel. We think this is plainly wrong. Aside from the fact that the district court nowhere referred to collateral estoppel in its opinion, and that the doctrine would obviously not properly have applied since plaintiff Poster was not a party to the Philadelphia litigation, our 1961 opinion affirming the denial of summary judgment in favor of National Screen had already indicated that the Philadelphia litigation's findings were not

Poster's action against National Screen still remained, and it ultimately won a judgment for damages suffered day to day for the four years prior to initiation of its suit. On National Screen's appeal we affirmed. Poster Exchange Inc. v. National Screen Service Corp., 5 Cir. 1970, 431 F.2d 334. A few days thereafter Poster initiated this suit against National Screen and all six Producers, complaining that National Screen had continued in its monopoly and attempted monopoly in violation of Sherman Act § 2 and that all the defendants had continued in a "combination and conspiracy. . . in unreasonable restraint of the interstate trade and commerce in the production and distribution of standard and specialty accessories in violation of Section 1 of the Sherman Act," through the date of suit, all to the considerable pecuniary damage of Poster .

The district court then granted summary judgment in favor of the Producers on grounds of limitations[7] and res judicata, and Poster appealed. We reversed. Poster Inc. v. National Screen Service Corp., 5 Cir. 1972, 456 F. 2d 662. First, we held that the res judicata reasoning relied upon by the trial court could not support its judgment. Second, we held that the intervening decision in Zenith Radio Corp. v. Hazeltine Research,Inc., 1971, 401 U.S. 321,

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conclusive in this Atlanta litigation between different parties and concerning a different time period. As we have previously noted, see Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1972, 456 F.2d 662, we think it clear that the district court relied on the *Lawlor* case and its offspring solely for their value as *stare decisis*.

7. Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.....

91 S. Ct. 795, 28 L. Ed. 2d 77, required a reversal of the district court's conclusion on the limitations issue. Anticipating the significance of collateral estoppel issues on remand we additionally directed the district court to the principles enunciated in our 1970 opinion in the New Orleans litigation, Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1970, 421 F. 2d 1313, cert. denied, 1971, 400 U.S. 991, 91 S. Ct. 454, 27 L. Ed. 2d 439. We observed that:

> With respect to post-1961 actions which substantively are not foreclosed by the 1963 summary judgment, Poster may recover damages for all such acts which occurred within four years of the 1969 suit. As to such acts occurring prior to 1965,it can recover for such damages as could not reasonably have been proved prior to February 26, 1965. . . . .

456 F.2d at 667. Moreover, in remanding the case we advised that:

> Good judicial husbandry calls for an effective pretrial management of this case which has now occupied the attention of not less than four trial judges, fifteen Circuit judges and Supreme Court justices twice.[T]he District Court should require by suitable means that Poster outline in detail what its claim is. The Court should determine as to the parties to the 1963 suit what, if any, issues were necessarily determined in the 1963 summary judgment. . . . Then, with precision, Poster should demonstrate what post-1961 acts substantively constitute

antitrust violations on theories declared in [our 1970 opinion in the New Orleans litigation]. With respect to such substantive acts occurring prior to February 26, 1965, Poster should show the relevant facts on which to fix the earliest reasonable time or times for which damages for such claim or claims could have been proved to fix the commencement of the limitations period under *Zenith*. Considering the persistent inability of Poster to appreciate the significance of res judicata -- collateral estoppel or the difficulties from parrotting the prior complaints in amended ones covering different periods of time and, on the other hand, like persistence by National [Screen] in asserting contentions now so often rejected by us, it would surely be in order to appoint a special master (F.R. Civ. P. 53), with his allowance to be taxed as costs for an orderly determination of just what remains to be disposed of by summary judgment on the basis of the facts, not just pleadings, or by trial.

456 F. 2d at 668.

Pursuant to our recommendation, on remand the district court did appoint a master to facilitate the progress of Poster's lawsuit. In a response to the master's order to outline in detail the precise nature of its claims and state "the specific acts (or nonacts) of the defendants to be relied upon as proof of [the alleged] violations," Poster recited the pre-1961 history of dealings between the Producers and National Screen in regard to the standard motion picture accessory market, and charged that all the defendant Producers have persisted through the four-year period preceding suit (February 26, 1965, to February 26, 1969) in their alleged

exclusive dealing with National Screen. As in Exhibitors Poster Exchange, Inc. v. National Screen Services Corp., 5 Cir., ——F.2d——, No. 74-1459, the plaintiff asserted no basis for belief or inference that the alleged Producer-conspirators have engaged in conduct different in any way from that complained of in the prior suit against them. After an exhaustive review of the record in the prior case in which the Producers had won summary judgment, the master determined that in this action Poster complains only of the Producers continuation in the conduct adjudged lawful in the district court's 1963 summary judgment in their favor. The master thus concluded that the Producers who were defendants in that prior action were entitled to a summary judgment on the basis of collateral estoppel. Moreover, the master observed that the allegations and attempted proof of conspiracy in Poster's 1961 suit applied equally to Columbia although Columbia was itself not a defendant, and recommended on that basis that Columbia was equally entitled to employ the 1963 judgment as an estoppel against Poster's present case against it for continuation in identical conduct. Finally, the master suggested that Poster's claims against all the Producers were barred by the four year statute of limitations, because the acts complained of transpired more than four years prior to the initiation of this suit in 1969, and because Poster had not shown its case to come within the *Zenith* exception, see Zenith Radio Corp. v. Hazeltine Research, Inc., 1971, 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77, permitting the present recovery of previously unprovable damages from prior actionable antitrust acts.After reviewing the record, the master's report, and Poster's objections to that report, the district court entered an opinion adopting the recommendations of the master in full, and granted the

Producers a summary judgment.

II

We are faced with three issues on this appeal: first, the correctness of the district court's collateral estoppel holding in favor of the Producer defendants exonerated in Poster's 1961 suit; second, the entitlement of Columbia--which was not a defendant in that suit-- to employ it as a collateral estoppel here; third, the applicability of the statute of limitations to bar Poster's claim against these defendants' allegedly continuing antitrust conspiracy.[8]

[1] We have no difficulty in affirming the district court's collateral estoppel judgment for the Producers who were charged as defendants in Poster's 1961 suit. This aspect of the case is identical to and controlled by our decision today in Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., ——F.2d——, No. 74-1459. Poster has failed to demonstrate any change in the facts or circumstances differentiating the conspiracy alleged here from the conspiracy among the identical defendants alleged and unproved in its 1961 suit. The entire case alleged against the

8. While Poster's complaint in this case alleges antitrust violations involving the standard and specialty accessory industries, it is clear that the 1963 district court opinion relied upon here as an estoppel by the Producers disposed of the issue of conspiracy in the standard accessory business only. In its exceptions to the Master's recommendations and in its appeal here Poster has apparently abandoned any claim of a separate antitrust conspiracy and monopoly in the less important specialty trade, however, for we search in vain for any argument on the point. In any event, it is quite clear that, upon the principles recognized in part III of this opinion, Poster's complaint regarding the specialty accessory trade is barred by limitations. Poster having failed to come forward with any intimation of any act during the four years preceding this suit which foreclosed it from the specialty business.

Producers is that they have continued to supply National Screen with accessories, pursuant to the pre-1961 allegedly exclusive dealing contracts unsuccessfully sued upon in Poster's last action. As in No. 74-1459, the sole argument raised by Poster against collateral estoppel is that it cannot be estopped by a summary judgment entered without specific findings. But as we have pointed out today in No. 74-1459 this argument has already been rejected in our 1970 opinion in the New Orleans litigation, Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., 1970, 421 F.2d, 1313, 1319-20, and we are bound by that decision.

[2,3] The summary judgment entered in the 1961 suit by necessity determined that upon the facts shown none of the Producer defendants had conspired unlawfully with Columbia. Columbia seeks here by that judgment to estop Poster from proceeding on its allegations that Columbia illegally conspired with the remaining Producers. We agree with the district court that collateral estoppel is correctly invoked here with respect to Columbia as well. Prior practice would not have recognized the estoppel here, for lack of mutuality,[9] but as we recognized in Rachal v. Hill, 5 Cir. 1970, 435 F. 2d 59, 61-62:

9. That is, had Poster prevailed in its 1961 suit, upon the ground that some or all of the defendant producers had unlawfully conspired with Columbia, as Poster pleaded, Poster would not be entitled to rely upon that finding as an estoppel in a separate action against Columbia.

> Although many states still honor the rule of mutuality of estoppel, the modern trend has been to discard the rule and preclude a party from relitigating an issue decided against him in a prior action, even if the party asserting the estoppel was a stranger to the prior action. . . . The federal rule comports with the modern trend and thus it is clear that the requirements of mutuality need not be met for collateral estoppel to be applied in an action presenting a federal question in the courts of the United States.

See also Zdanok v. Glidden Co., 2 Cir. 1964, 327 F.2d 944, 954-56, cert. denied 1964, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed. 2d 298; Bruszewski v. United States, 3 Cir. 1950, 181 F.2d 419, cert. denied, 1950, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632; Bernhard v. Bank of America, etc. 1942, 19 Cal. 2d 807, 811-13, 122 P.2d 892, 894-95. This trend, which has been smiled upon by the Supreme Court, *see* Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 1971, 403 U.S. 313, 91 S.Ct. 1434, 28 L.Ed. 2d 788, has already been embraced by this Court. See Cheramie v. Tucker, 5 Cir. 1974, 493 F.2d 586, 589 n.10; Rachal v. Hill, *supra;* see also James Talcott, Inc. v. Allahabad Bank, Ltd., 5 Cir. 1971, 444 F.2d 451, 461; Monsanto Co. v. Dawson Chemical Co., 5 Cir. 1971, 443 F.2d 1035; Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan, 5 Cir. 1969, 410 F.2d 718, 727, cert. denied, 1969, 396 U.S. 905, 90 S.Ct. 219, 24 L.Ed. 2d 181. Where mutuality is lacking, a plaintiff may not be collaterally estopped if he did not enjoy "a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time" *Blonder-Tongue, supra,* 402 U.S. at 333, 91 S.Ct. at 1445, 28 L.Ed.

2d at 802, quoting Eisel v. Columbia Packing Co., D. Mass. 1960, 181 F.Supp. 298, 301. But here, where plaintiff Poster had the initiative in a recognizably substantial litigation, and specifically chose to cite Columbia as one of the alleged conspirators, there is no suggestion of any failure of fairness in the original litigation, so as to render it unsupportive of an estoppel. See generally, *Blonder-Tongue supra,* 402 U.S. at 332-34, 91 S. Ct. at 1444-1446, 28 L.Ed. 2d at 402; Zdanok v. Glidden Co., *supra,* 327 F.2d at 955-56; James Talcott, Inc. v. Allahabad Bank, Ltd., *supra,* 444 F.2d at 462-63. Admitting "that in the modernized version of the law of collateral estoppel the ancient requirements of mutuality is no longer necessary," Poster's argument on this aspect of its appeal is only a recitation of its position that collateral estoppel must be based upon the result of a trial to the jury. A plaintiff's failure to muster sufficient proof to survive a summary judgment motion in the trial court or to sustain a jury verdict, however, is no demonstration that it was denied a fair opportunity to present its claim. *See* Cheramie v. Tucker, *supra.*

[4] We believe that the district court did err, however, in holding that Poster's entire claim against Columbia was resolved by the collateral estoppel of the summary judgment for the Producers in Poster's 1961 suit. No judgment was ever entered in that litigation regarding the allegation that Columbia conspired with National Screen for the purpose of establishing or augmenting National Screen's monopoly. Thus, we cannot agree that Poster is collaterally estopped from maintaining its claim in this suit that Columbia's relations with National Screen amount to a vertical § 1 conspiracy.

III

Poster's remaining claim against Columbia is that Columbia continued through the four year period preceding initiation of this suit in 1969 to conspire with National Screen to consolidate National Screen's monopoly position as the sole distributor of standard motion picture advertising accessories, in return for a share of the monopoly profits extracted from theater owners left dependent upon National Screen for their supplies. Accordingly, Poster seeks to recover triple the damages it has suffered during this four year period which result from the continuation of the alleged conspiracy and monopoly during this four year period.[10]

The district court believed that Poster's claim was barred by the four year statute of limitations, 15 U.S.C.§ 15b[11] however, because it considered Poster's claim as one arising essentially from National Screen's May 16, 1961, refusal to continue dealing with Poster. In adopting this approach the court adhered to the view expressed in its earlier summary judgment for all the Producers, Poster Exchange, Inc. v. National Screen Service Corp., N.D. Ga. 1969, 306 F.Supp. 491, 492, "That the theory of 'continuing conspiracy' is not the law in the Fifth Circuit." But we reversed that summary

10. Poster has alleged its continuing inability to secure standard accessories during the four year period, February 26, 1965 to 1969, through the continuation of exclusive dealing between the Producers and National Screen and through the continuation of National Screen's refusal to deal with Poster.

11. Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accured.

judgment, 5 Cir. 1972, 456 F.2d 662, in light of Zenith Radio Corp. v. Hazeltine Research, Inc., 1971, 401 U.S. 321; 338–42, 91 S. Ct. 795, 806-808, 28 L.Ed. 2d 77, 92-94. There we said:

> [T]he statute of limitations problem is present with respect to (i) pre-1961 conduct (or non-action) not foreclosed by collateral estoppel and (ii) post-1961 conduct occurring more than four years prior to [the filing of this suit].

Here *Zenith, supra,* cuts a big figure. First, whatever expressions we have used from time to time, which might suggest that in antitrust situations there is no such thing as a continuing conspiracy, now must yield their sweeping force. . . .

More importantly, what is emphasized, perhaps for the first time, is that for acts which have long since taken place-- and which are in no sense repeated in conjunction with new acts (or non-acts)-- the act in effect is "revived" as a basis for later damages under a certain circumstance. That circumstance is the inability of the injured victim to earlier prove with requisite certainty the existence and amount of damages. In that circumstance it is a holding that in antitrust cases subsequent damages have not yet "accrued." They do not "accrue" until they can be reasonably established. The moment the victim can prove such subsequent damages, the statute begins to run leaving four more years in which to assert them. . . .

456 F.2d at 666-67. Thus, we concluded that:

> With respect to post-1961 actions which substantively are not foreclosed by the 1963 summary judgment, Poster may recover damages for all such acts which occurred within four years of the initiation of [this suit]. As to such acts occurring prior to 1965, it can recover for such damages as could not reasonably have been proved to February 26, 1965.

456 F.2d at 467.

[5] On remand Poster declined to bring forward any evidence to show that it now suffers any damages from pre-1965 acts, which damages were unprovable before February 26, 1965. Thus, this aspect of *Zenith* is out of the case. As we have already stated, however, Poster has consistently maintained, in reliance on the "continuing conspiracy" aspect of *Zenith*, that it is entitled to recover for damages accruing during the four year period preceding this suit which have been caused by continuation of the alleged injurious acts of the alleged conspiracy and monopoly during that period. Poster is correct in this assertion. To repeat our 1972 opinion once again, we held that "with respect to post-1961 actions which substantively are not foreclosed by the 1963 summary judgment, Poster may recover damages for all such acts which occurred within four years of the [initiation of this] suit." As we have pointed out in part II, *supra*. Poster's claim against Columbia for conspiring with National Screen is not foreclosed by the 1963 summary judgment in favor of the other Producers, and thus it is clear from our previous opinion -- which binds us at the least as the law of the case[12] and stare decisis -- that this claim is not barred by

12. See, e.g., Zdanok v. Glidden Co., 2 Cir. 1964,327 F.2d 944,952-53.

limitations. The vigor with which counsel have debated the limitations issue, however, and the decisions below and in Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir., ——F.2d——, No. 74-2172, persuade us of the necessity to explain in some greater detail the precise rationale of our holding on this complex issue.

[6] Since Crummer Co. v. Du Pont, 5 Cir. 1955, 223 F.2d 238, 248, we have recognized that for statute of limitations purposes a new cause of action against an antitrust conspiracy arises "from each act in violation of the antitrust laws for the damages flowing therefrom." The question presented here is whether the alleged continuing conspiracy and monopoly interfering with Poster's ability to supply itself with advertising accessories is to be treated for statute of limitations purposes as a single act and invasion of Poster's rights, occuring with the original refusal to deal on May 16, 1961, or with the earlier birth of the alleged conspiracy, or whether it may be viewed as a continuing series of acts upon which successive causes of actions may accrue. We are persuaded that the latter view is correct.

Columbia's argument to the contrary rests upon Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., N.D. Ala. 1960, 197 F. Supp. 333, 338, opinion on limitations adopted, 5 Cir. 1961, 295 F.2d 362 to establish that a continued refusal to deal such as Poster allegedly suffers from here constitutes a single invasion of the plaintiffs' right, and gives rise to a single substantive cause of action. The plaintiff wholesaler in *Norman Tobacco* complained of a "classic" conspiratorial refusal to deal by the defendant manufacturer Gillette; but the Court held that the plaintiff's suit was

barred under the then applicable Alabama one year limitations statute, since the initial cut-off had occurred more than a year before the suit was filed, and since there was no reiteration of the refusal within a year. The court also reasoned, that even if the refusal had been reiterated during the latest year, "it probably would not constitute an actionable claim." 197 F.Supp. at 338 n. 17. This conclusion was apparently reached upon the reasoning that "recovery in this action may not be predicated upon the theory that the original refusal to deal is in the nature of a continuing tort or done pursuant to a continuing conspiracy." *Id.*, 338.

A subsequent case, Braun v. Berenson, 5 Cir. 1970, 432 2d 538, 542, while distinguishing *Norman Tobacco*, recognized that the dictum there was in accord with the refusal to deal cases from other jurisdictions which held in similar circumstances that "the cause of action accrued when the initial refusal to deal was made, and was therefore barred by the running of the statute of limitations, because the damages suffered by the distributors were sustained at that time and in no way altered or affected by the subsequent refusals occurring within the limitations period." *Id.*, 542-43. *See e. g.*, Garelick v. Goerlich's, Inc., 6 Cir. 1963, 323 F.2d 854.

We are persuaded that after *Zenith* and Hanover Shoe, Inc. v. United Shoe Machinery Corp., 1968, 392 U.S. 481, 502 n. 15, 88 S.Ct. 2224, 2236, 20 L.Ed. 2d 1231, 1246, the *Norman Tobacco* dictum cannot be understood to control, at least in this monopoly context. As we particularly noted in our last opinion in this Atlanta litigation, "Here *Zenith*, *supra*, cuts a big figure. . . . [W]hatever expressions we have used from time to time, which might suggest that in antitrust

situations there is no such thing as a continuing conspiracy, now must yield their sweeping force." 456 F.2d at 666.

Poster's complaint in this case is based on a continuing antitrust behavior, not merely a continuing damage it feels from a single day's monopoly and refusal to deal in 1961. Indeed, our 1970 opinion affirming Poster's recovery in its 1969 trial against National Screen of damages whose computation was based on a day by day calculation of accruing injury according to Bigelow v. R. K. O. Radio Pictures, Inc., 1945, 327 U.S. 251, 66 S.Ct. 574, 90 L. Ed. 652, demonstrates the continuing nature of the injury Poster complains of, as well as its daily calculability.[13] *Cf.* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 3 Cir. 1967, 377 F.2d 776, 794, aff'd in this regard, 392 U.S. at 502 n. 15, 88 S. Ct. at 2236, 20 L.Ed. 2d at 1246, distinguishing *Norman Tobacco, supra.* Moreover, in cases where plaintiffs have suffered from a continued refusal to deal, they have been forbidden from proving damages inflicted by persistence of the refusal after the date of filing suit, precisely on the ground that a plaintiff is barred from recovering on injuries caused by wrongful *acts* subsequent to suit, and the

> cause of action is founded on an act of a continuing nature. The [initial] express refusal to deal constituted no more than a refusal to deal at that time.

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13. As we noted in our last opinion in this case, reversing the Producers summary judgment on limitations in light of Zenith, Poster's 1969 recovery apparently anticipated the Zenith rationale. See Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1972, 456 F.2d 662, 668 n. 13.

Flintkote Co. v. Lysfjord, 9 Cir. 1957, 246 F.2d 368, 394-96, cert. denied, 355 U.S. 835, 78 S. Ct. 54, 2 L.Ed. 2d 46; Connecticut Importing Co. v. Frankfort Distilleries, 2 Cir 1939, 101 F.2d 79; Frey & Son, Inc., v. Cudahy Packing Co., D. Md. 1917, 243 F.205.[14] See also Momand v. Universal Film Exchange, Inc., D. Mass. 1942, 43 F.Supp. 996, 1006, aff'd 1 Cir. 1948, 172 F.2d 37, 49, cited with approval in *Zenith*, 401 U.S. at 338, 91 S. Ct. at 806, 28 L.Ed. 2d at 92.[15]

[7] The Supreme Court's approval of this approach is indicated in *Hanover Shoe, supra.* There the antitrust defendant had exercised its monopoly power since 1912 to force the plaintiff to lease (and not buy) its machinery at monopoly rates but the plaintiff did not sue until 1955. The Court held that the antitrust action was not barred by the statute of limitations with respect to the period 1951-1955 because

> [w]e are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. *Cf.* Emich Motors Corp. v. General Motors Corp., 229 F.2d 714 (C.A. 7 1956), upon

14. [W]here the injury sued for is caused by a mere repetition or continuation of acts of the same class as that for which the suit was brought, the plaintiff's recovery is limited to the damages resulting from such of those acts as were done before the bringing of the suit.

15. That is, had Poster initiated this action in 1961, as Columbia suggests it was obliged to, it could not then have recovered damages based upon the contuation of the defendant's allegedly illegal conduct during the 1965-1969 period,on the ground that the continuation of the conspiratorial acts during that period, and the consequent suffering of damages from contemporaneous market exclusion (as contrasted with damages suffered during the period as a consequence of the lingering effect of pre-1961 actions) would have been speculative only.

> which [the defendant] relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on [the plaintiff].

392 U.S. at 502 n.15, 88 S.Ct. at 2236, 20 L.Ed. 2d at 1246. This language applies equally aptly to the matter at bar.[16] These authorities[17] lay to rest the theory that under *Norman Tobacco's* dictum, suit upon a continued antitrust violation must be prosecuted within four years from the first act of illegality (plus, of course, any period during which the limitations period was tolled). Where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and

16. In its 1969 recovery against National Screen, affirmed in Poster Exchange Inc. v. National Screen Service Corp., 5 Cir. 1970, 431 F.2d 334, 340, Poster had damages from 1957-1961 against National Screen for monopolistic pricing and the making unavailable of sufficient poster supplies, conduct which had continued since the forties. The limitations problem was not discussed in the appellate or trial court opinion there; and it would seem precisely within *Hanover Shoe.* We see no distinction in principle now that National Screen has allegedly found it feasible to expand its monopoly control by totally cutting Poster off from all sources of supply.

17. Consistent with this approach, we declined to follow *Norman* and its cousins in Braun v. Berenson, 5 Cir. 1970, 432 F.2d 538. Distinguishing the Norman dictum, we held that where a shopping center landlord, allegedly conspiring with a haberdasher tenant, refused successively to rent several vacant storefronts to the plaintiff, each alleged refusal constituted a separate violation, so that suit could be brought upon the last refusal alone, the only refusal within four years of the suit.

upon the initial act.[18] But here, where the action complained of was the exclusion of Poster from any participation in the standard accessory industry, such action, while perhaps unequivocal, was not of necessity permanent, see Flintkote Co. v. Lysfjord *supra*, 246 F.2d at 395; see also Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 328 n. 13 and accompanying text, 75 S.Ct. 865, 868 n.13, 99 L.Ed. 1122, 1127, we are not dealing with an act which occurs "within some specific and limited time span. . . . Rather, we are dealing with conduct which constituted a continuing violation." *See also* Baker v. F. & F. Investment, 7 Cir. 1970, 420 F.2d 1191, 1200; Highland Supply Corp. v. Reynolds Metals Co., 8 Cir. 1964, 327 F.2d 725, 732; Susser v. Carvel Corp., S.D.N.Y. 1962, 206 F.Supp. 636, 651-52, aff'd, 2 Cir. 1964, 332 F.2d 505, cert. dismissed, 1965, 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed. 2d 284; Cardinal Films, Inc., v. Republic Pictures, Corp., S.D.N.Y. 1957, 148 F.Supp. 156, 159-60. This reasoning is sealed by the unqualified embrace in *Zenith* of the recognition that each injurious act of a continuing conspiracy gives rise to an antitrust cause of action, and the *Zenith* opinions' conspicious selection of authorities eschewing the requirement of acts different in kind to set up a later accruing cause of action:

> In the context of a continuing conspiracy to violate the antitrust laws . . [it] has usually been understood . . that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to

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18 *Cf.* Emich Motors Corp. v. General Motors Corp., 7 Cir. 1956, 229 F.2d 714, 719, 720 rev'd on other grounds, 1957, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534, involving a dealership cancellation.

> recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. See, e.g., Crummer Co. v. Du Pont, 223 F.2d 238, 247-48 (C.A. 5, 1955); Delta Theaters, Inc. v. Paramount Pictures, Inc., 158 F.Supp. 644, 648 (E.D.La. 1958); Momand v. Universal Film Exchange, Inc., 43 F.Supp. 996, 1006 (D. Mass. 1942), aff'd. 172 F.2d [37], at 49 (C.A. 1 1948). . . .
>
> Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date.

401 U.S. at 338, 91 S.Ct. at 806, 28 L.Ed. 2d at 92. Here, Poster complains that during the four-year period sued upon, it has been continually injured by Columbia's and National Screen's conspiratorial foreclosure of Poster from access to supplies. Under *Zenith* we are obliged to recognize Poster's continually accruing cause of action during this period.

Moreover, aside from the conclusive effect of these authorities, any other result here would, we think, improperly transform the limitations statute from one of repose to one of continued immunity. For according to Columbia's argument, a plaintiff who suffers continuing damage from the continued invasion of a monopoly and exclusion from the market is barred not only from proving violations and damages more than four years old, but is barred forever from complaining of the continuing excuse of the unlawful con-

The function of the limitations statute is simply to pull the blanket of peace over acts and events which have themselves already slept for the statutory period, thus barring the proof of wrongs embedded in time-passed events. See Delta Theaters, Inc. v. Paramount Pictures, Inc. E.D. La. 1958, 158 F. Supp. 644, 648. Employing the limitations statute additionally to immunize recent repetition on continuation of violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions. See *generally Zenith*, 401 U.S. at 340, 91 S.Ct. at 807, 28 L.Ed. 2d at 93; Lawlor v. National Screen Service Corp., 1955, 349 U.S. 322, 329, 75 S. Ct. 865, 869, 99 L.Ed. 1122, 1128; Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 5 Cir. 1970, 421 F.2d 1313, 1318.

[8,9] The authorities cited above establish that continuing antitrust conduct resulting in a continued invasion of a plaintiff's rights may give rise to continually accruing rights of action. It remains clear nonetheless that a newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action.

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. See, e.g., Suckow Borax Mines Consolidated, Inc., v. Borax Consolidated, Ltd., 185 F.2d 196, 208 (CA 9 1950); Bluefields S.S. Co. v. United Fruit Co., 243 F. 1, 20 (CA 3 1917) appeal dismissed, 248 U.S. 595, 39 S.Ct. 136, 63 L.Ed. 438 (1919); 2361 State Corp. v. Sealy, Inc., 263 F. Supp. 845, 850 (N.D.Ill.1967). This much is plain from the treble-damage statute itself. 15 U.S.C.§15[19].

Zenith, supra, 401 U.S. at 338, 91 S.Ct. at 806, 28 L.Ed. 2d at 92. See also Crummer Co. v. Du Pont, 5 Cir. 1955, 223 F. 2d 238, 247-48; Streiffer v. Seafarers Sea Chest Corp., E.D. La. 1958, 162 F.Supp. 602. That is Poster here is obliged to demonstrate some act of the defendants during the limitattions period foreclosing or interfering with its access to supplies. Although Poster avers that National Screen alone has distributed the Producers' posters, in accord with assertedly exclusive agreements entered into long before 1965, during the period sued upon, it has failed to demonstrate that it has been refused access to standard accessories by Columbia during that period. We are less certain of the proper disposition of the allegation that National Screen——with Columbia's alleged complicity[20]——has continued during the period in suit to refuse to deal with Poster. While National Screen

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19. 15 U.S.C.§15 provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

20. We cannot be certain on the present state of the record that the activities and relationship between Columbia and National Screen were identical in kind and quality with the relationships averred in Posters previous case to exist between the other Producers and National Screen. Thus, the present state of the record does not invite our con-

explicitly denied that Poster made any demand upon it for access to standard accessories dueing 1965-1969,[21] our cautious reading of the district court's opinion suggests that, in reliance on the somewhat conclusory averment of Poster's president,[22] the court believed that there might be a triable issue as to whether National Screen had "continued to refuse" to deal in standard accessories with Poster. As the foregoing discussion makes clear, we think it critical that the court determine whether there was, during the period sued upon, a mere absence of dealing, or whether there was some specific act or word precluding Poster from obtaining supplies from National Screen. Since the district court was of the opinion that a cause of action arose in neither case, we cannot be absolutely certain, as we think necessary in this summmary judgment context,[23] whether the district court accepted plaintiff's averments as indicating that there had been a specific act or word of refusal during the limitations

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sideration of a substantive summary judgment resolution of this issue based on the precise stare decisis value of our opinion in Poster Exchange, Inc. v. Paramount Film Distributing Corp., 5 Cir., 1965, 340 F. 2d 320. Cf. also Poster Exchange Inc. v. National Screen Service Corp., 5 Cir. 1972, 456 F.2d 662, 664 n.7.

21. National Screen's Affidavit in Opposition to Plaintiff's Motion for Partial Summary Judgment Against National Screen with Respect to Issue of its Alleged Liability, Doc. 36.

22. Affidavit in Support of Motion for Summary Judgment, Doc. 14: Plaintiff's Memorandum in Response to Order of the Special Master dated October 24, 1972, Doc. 66.

23. See, e.g., National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F.2d 647.

period. We therefore find it necessary to remand the case for a clarification on this narrow question. If, upon remand Poster is unable to present a triable issue of fact as to the occurrence of any specific act or word denying to it of access to Columbia's posters for disttribution during the statutory period, then it may recover no damages, and judgment should be entered against it. If Poster satisfies the burden, then the district court should hold such further proceedings as are required, not inconsistent with this opinion.

The aperture as to Columbia on remand is a narrow one, but in the judicial search for factual certitude, we must be convinced that Columbia was either antitrust pure or impure during the statutory period. The affidavits and the trial court's findings in this case lack that pellucidity which is necessary to assure us that the summary judgment was properly entered. Since we can be content with no less, we remand for the limited purposes herein set forth.

Affirmed as to all defendants save Columbia; vacated as to Columbia and remanded for further proceedings.

APPENDIX G

JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1974

No. 74-1512

D. C. Docket No. CA 12497

THE POSTER EXCHANGE, INC.,
Plaintiff-Appellant,
versus
NATIONAL SCREEN SERVICE CORPORATION, ET AL.
Defendants,
COLUMBIA PICTURES CORP., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Georgia

Before TUTTLE, WISDOM and GOLDBERG, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed as to all defendants save Columbia; and vacated as to Columbia; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal in this Court.

August 8, 1975

Issued as Mandate:

APPENDIX H

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE POSTER EXCHANGE, INC.,
Plaintiff
versus
NATIONAL SCREEN SERVICE CORPORATION
ET AL.,

No. 12497 - CIVIL ACTION

OPINION OF JUDGE ALBERT J. HENDERSON, JR.
Motion for Summary Judgment

This is the progeny of *Poster VI*[1] and probably the progenitor of an opinion eventually to be written and designated *Poster VII*. The actors and plot in this serial of protracted litigation[2] have become so familiar to all parties involved that little purpose would be served by a reiteration

1. Poster Exchange, Inc. National Screen Service Corporation, 456 F.2d 662 (5th Cir. 1972).

2. The history preceding Poster VI, supra n.1, is as follows: National Screen Service Corp. v. Poster Exchange, Inc. 305 F.2d 647 (5th Cir. 1962) [Poster I] affirming 198 F. Supp. 557 (N. D. Ga. 1961); Poster Exchange, Inc. v. Paramount Film Dist. Co., 340 F. 2d 320 (5th Cir. 1965), cert. den. 381 U. S. 936 [Poster II], affirming 35 F.R. D. 558 (N.D. Ga. 1963).

of the historical background underlying this action. However, to bring this order into its proper perspective a limited review of the present posture of this particular suit is in order.

This action commenced on February 26, 1969 with the filing of a complaint for treble damages for alleged violations of the Sherman Act, 15 U.S.C. §§ 1 and 2. Named as defendants were certain motion picture producers and distributors [hereinafter referred to collectively as "distributors")[3] and their sole licenses to produce and distribute advertising accessories for their motion pictures, National Screen Service Corporation (hereinafter referred to as "National Screen"). The thrust of the plaintiff's claim against these defendants is that they are jointly engaged in a continuing conspiracy to restrain trade in and monopolize the motion picture advertising accessory business. In this regard, the plaintiff, itself, has characterized its present action as "in effect, a continuation of Civil Action No. 7665." (See Plaintiff's "Motion for Entry of a Preliminary Injunction and Rule to Show Cause",§ 1).

Poster Exchange, Inc. v. National Screen Service Corp., 362 F.2d 571 (5th Cir. 1966) [Poster III];

Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313 (5th Cir. 1970), reh. den. 427 F.2d 710, cert. den. 400 U.S. 991 [Poster IV];

Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), cert. den. 401 U.S. 912 [Poster V].

3. Originally Columbia Pictures Corp., Loew's Incorporated, Metro Goldwyn Mayer, Inc., Paramount Film Distributing Corporation, Twentieth Century Fox Film Corp., United Artists Corp., Universal Film Exchanges, Inc. and Warner Bros. Pictures Distributing Corp., although Loew's Incorporated and Universal Film Exchanges, Inc. are no longer named defendants.

Civil Action No. 7665 was originally filed in this court by the same plaintiff in 1961 naming only National Screen as a defendant. Subsequently, in 1963, the plaintiff filed an amended complaint alleging a conspiracy to violate the anti-trust laws and adding as defendants five of the six distributors presently named in the instant suit.[4] Shortly thereafter, the court granted a motion for summary judgment in favor of the distributor defendants upon determining that the facts presented were insufficient to establish the alleged conspiracy. *Poster Exchange, Inc. v. National Screen Service Corporation,* 35 F.R.D. 558 (N.D. Ga. 1963). That decision was affirmed *per curiam* by the Fifth Circuit United States Court of Appeals in *Poster II.* Civil Action No. 7665 eventually proceeded to judgment against the only remaining defendant, National Screen, which was found to have individually acted in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. The order of the court dated February 17, 1969, nine days before the initiation of the present suit, was subsequently affirmed as to liability by the Court of Appeals in *Poster V.*

The distributor defendants in this case moved for summary judgment on the grounds that the claim is barred as to all defendants by operation of the statute of limitations set forth in 15 U.S.C. § 15 b and that it is also foreclosed as against the distributors by application of *res judicata* and collateral estoppel, based upon the prior disposition of the conspiracy claim in Civil Action No. 7665. This court grant-

4. Columbia Pictures Industries, Inc. was not named as a defendant in Civil Action No. 7665.

ed summary judgment in favor of the distributors relying specifically upon the ground that the action was barred by the four year statute of limitations. *Poster Exchange Inc. v. National Screen Service Corp.,* 306 F.Supp. 491 (N.D. Ga. 1969). The court further implied that a similar result could be reached by applying the doctrine of *res judicata.* The effect of the principle of collateral estoppel in this context was not reached in granting this summary judgment. Accordingly, the action was dismissed and the judgment made final as to the distributor defendants by order dated November 11, 1969.

While continuing to press its suit against the only remaining defendant, National Screen, the plaintiff also appealed this court's grant of summary judgment in favor of the distributors. It is the Fifth Circuit's disposition of that appeal in *Poster V* which necessitated this order.

Chief Judge Brown, writing for the Fifth Circuit Court of Appeals in *Poster VI,* vacated the summary judgment and remanded the case to this court for further action consistent with the opinion rendered by the circuit court. That court rejected *res judicata* as a viable basis for the summary judgment in favor of all distributor defendants. It proceeded to focus on the question of the applicability of collateral estoppel, which had not previously been explored by this court, and the propriety of this court's determination of the statute of limitations defense. In outlining a proposed analytical approach to the issues involved, the court stated, first, with respect to the collateral estoppel defense:

Whatever issues the [district] Court, on examination

> of the 1963 suit record, finds necessarily to have been resolved [in Civil Action No. 7665. 35 F.R.D. 558 (N.D. Ga. 1963), affirmed in *Poster II*] - rightly or wrongly - are no longer open to litigation. As to them, the bar is complete quite apart from the statute of limitations.

Poster VI, 456 F.2d at 666. On the statute of limitations issue, it continued:

> But the statute of limitations problem is present with respect to (i) pre-1961 conduct (or non-action) not foreclosed by collateral estoppel and (ii) post-1961 conduct occurring more than four years prior to the 1969 suit (No. 12497).

Ibid. Regarding the latter possibility, the Court of Appeals discussed the recent Supreme Court decision, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), and concluded that:

> With respect to post-1961 actions which substantively are not foreclosed by the 1963 summary judgment, Poster may recover damages for all such acts which occurred within four years of the 1969 suit. As to such acts occurring prior to 1965, it can recover for such damages as could not reasonably have been proved prior to February 26. 1965. This could conceivably include damages for acts occurring pre-1961 without establishing independent post-1961 acts as a cause.

Ibid, 456 F.2d at 667-68. Judge Brown finally suggested that

the court appoint a special master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, "for an orderly determination of just what remains to be disposed of by summary judgment on the basis of the facts, not just pleadings, or by trial." *Ibid* at 668.

Thus, by order of reference dated September 28, 1972, a Special Master was appointed to inquire into these matters and to prepare a report containing proposed findings of fact and conclusions of law. That report was filed on July 30, 1973 and the plaintiff subsequently filed objections to certain of the legal and factual conclusions contained therein.

In substance, the conclusions reached by the Master in his report are that:

(1) The plaintiff's action against the distributor defendants, including Columbia Pictures Corporation, is barred by the doctrine of collateral estoppel growing out of the summary judgment granted in the earlier litigation among these parties;

(2) The plaintiff's action against all the defendants is also barred by the statute of limitations set forth in 15 U.S. § 15 b; and

(3) The exception to the four year statute of limitations created by *Zenith Radio Corp., supra,* is inapplicable to this case.

Upon careful consideration of the findings and conclusions of the Special Master's report, it is approved in its en-

tirety and is hereby incorporated in this order by reference. The plaintiff's objections to both factual and legal conclusions are rejected and overruled. However, in light of the demonstrated contentiousness of counsel for the parties involved, it would not be overly cautious to elaborate further on the Plaintiff's specific objections.

Looking first to the objections to the findings of fact, the court agrees with the Master's Finding No. 1 that the allegations of violations of the antitrust laws charged in the present complaint are "identical in substance" to those in the amended complaint in the earlier Civil Action No. 7665. The same incidents and occurrences are asserted in both complaints as the crux of the plaintiff's claim, with the present suit simply contending that the status of all parties has remained unchanged in the interim since the initial acts were committed. Also, the plaintiff, in objecting to Finding No. 8, denies that "evidence" was submitted by the distributor defendants in support of their motion for summary judgment in Civil Action No. 7665. However, this argument is clearly refuted by the record in that case which shows that that motion was expressly based upon certain designated answer to interrogatories, admissions and depositions, not to mention the admission in open court by counsel for the plaintiff that the evidence there relied on to establish the alleged conspiracy was the same as that presented in *Lawlor v. National Screen Service Corp.*, 270 F.2d 146 (3rd Cir. 1959); *cert. den.* 362 U.S. 922.

By its objections to the Master's conclusions of law, the plaintiff persists in its belief that because the prior adverse ruling on the issue of conspiracy by the defendant distributors was rendered by summary judgment, it cannot be accorded collateral estoppel effect.

Clearly, collateral estoppel cannot apply in a subsequent action to questions of fact not put in issue by the pleadings and actually submitted to a jury or other trier of facts in a previous suit. *Cromwell v. County of Sac*, 94 U.S. 351 (1877); *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir. 1970) (*Poster IV*). Thus, default judgments, consent judgments or judgments on stipulation generally cannot determine questions so as to preclude subsequent relitigation of the same issues. *E.g., Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); 1B Moore's *Federal Practice*, ¶ 0.444[1] (1965). The plaintiff, however, goes further to argue that a summary judgment, necessarily based upon a findings by the court that there is no genuine issue of fact involved, is not a factual determination for the purpose of collateral estoppel. That proposition has been specifically rejected by the Fifth Circuit in the earlier stages of the present series of litigation. In *Poster IV*, the court states:

> We reject out of hand the beguiling but superficial contention of Exhibitors that neither Suit No. 1 nor No. 2, can have any collateral estoppel effect because no summary judgment can have such effect. This is based on an overemphasis of two assertions: (1) a collateral estoppel results only from an actual decision of an issue and (2) a summary judgment results from a finding that there is no genuine issue as to any material fact.

> It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence - plaintiff's, defendant's, or all - of a directed verdict. Indeed, a more positive adjudication is hard to imagine.

Poster IV, 421 F.2d at 1319. This same view is also implicit in the directive of the Fifth Circuit in *Poster VI* to this court to determine what issues were decided by the previous summary judgment. *A fortiorari,* that initial summary judgment in Civil Action No. 7665 required a judicial determination that, as a matter of fact, the defendants were not engaged in the alleged conspiracy.

The plaintiff's other objection challenges the Master's application of 15 U.S.C. § 15 b which specifies that civil anti-trust actions must be "commenced within four years after the cause of action accrued." The plaintiff contends that the conduct of the defendants is in the nature of a continuing conspiracy to violate the antitrust laws with a new cause of action accruing every successive day. Accordingly, it urges that a new limitation period commences to run each day so long as the defendant National Screen continues to refuse to sell advertising accessories to the plaintiff. Carried to its logical extreme, this would mean that the plaintiff would be able to bring successive actions *ad infinitum* based upon the May, 1961 refusal by National Screen to deal with the plaintiff. This proposition cannot be sustained either as a matter of law or logic.

The Supreme Court's decision in *Zenith Radio Corp., supra.*, fails to fully resolve the question of when a cause of action has "accrued" in relation to the statute of limitations. First of all, that case dealt generally with the "context of a continuing conspiracy to violate the antitrust laws."*Ibid* at 338. More specifically, the issue there concerned the lawfulness of the continuing, collusive operation of foreign patent pools which effectively excluded that plaintiff from certain segments of the market. In the present case, however, the plaintiff continues to overlook the prior adjudication that the distributor defendants have not been engaged in an unlawful conspiracy, continuing or otherwise. Obviously, this leaves only National Screen, the sole authorized producer and distributor of motion picture advertising accessories, as a defendant in this action.

Furthermore, the only overt acts attributable to the defendants were prior to and culminated with the 1961 termination of the plaintiff's supply of advertising accessories when National Screen decided to vertically integrate the accessory distribution business. In applying the statute of limitations, it is necessary to distinguish between an act which itself confers a cause of action under the antitrust laws and the damages which may accrue as a result of that act. Here, although the plaintiff alleges that its business continues to be damaged because of its inability to obtain advertising accessories, there have not been any additional overt acts by the defendants since the original refusal by National Screen to supply accessories.

Zenith Radio Corp., supra, repeats the general rule that the statute of limitations commences to run upon the

commission of an "act" which is violative of the antitrust laws and which causes injury to the plaintiff's business. However, it does not address the problem now confronting the court concerning identification of the "act" constituting the cause of action. Examination of relevant judicial authority leads to the inescapable conclusion that this case can only fit within the classic "refusal to deal" mold. The characteristics of these cases were recently summed up by the Fifth Circuit Court of Appeals that:

> Each....involved the termination of a course of dealing whereby the defendant supplier or manufacturer regularly furnished a distributor or dealer with a certain continuously available product for resale and where any subsequent refusal was merely a reiteration of the previous termination,in no way altering what had already been done.

Braun v. Berenson, 432 F.2d 538 (5th Cir. 1970). See also *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.,* 197 F.Supp. 333 (N.D. Ala. 1960), *aff'd,* 295 F.2d 362 (5th Cir. 1961); *Emich Motors Corp. v. General Motors Corp.,* 229 F.2d 714 (7th Cir. 1956); *Garelick v. Goerlich's Inc.,* 323 F.2d 854 (6th Cir. 1963); *cf. Crummer Co. v. Du Pont,* 223 F.2d 238 (5th Cir. 1955). In such a situation, the cause of action accrues with the single initial act of terminating a source of supply. Adherence to this once announced refusal to deal or subsequent refusals which merely reiterate the initial denial do not comprise new causes of action regardless of the fact that damages may continue to be incurred over a long period of time after the original termination. *Southeastern Hose, Inc. v. Imperial-Eastman Corp.,*——F. Supp.——, Civil Action No. 16,608 (N.D. Ga. April 2, 1973).

Finally, the court's role in implementing the apparent mandate of the Fifth Circuit and the recommendations of the Special Master is subject to certain procedural limitations. Although the conclusions of the Special Master concerning the collateral estoppel question relate only to the distributor defendants, the finding pertaining to the application of the statute of limitations are not so confined. Indeed, as initially presented in the motion for summary judgment by the distributors and as subsequently discussed by both this court and the appeals court, the statute of limitations question implicitly involved all the named defendants in the case. However, notwithstanding the potentially broader reach of these deductions, the court is at this time constrained to act only within the scope of the motion for summary judgment by the distributor defendants originally filed on April 26, 1969 and subsequently remanded by the Fifth Circuit in *Poster VI* upon vacation of this court's original determination. Consequently, the conclusions of the Special Master will be applied here only as they affect the distributor defendants.

Accordingly, the motion for summary judgment filed on April 26, 1969 by the distributor defendants is granted.

Motion by Plaintiff for Reconsideration and Modification of the Order of Court Dated August 6, 1973

The plaintiff charges that the Special Master "misunderstood" the purpose of his appointment, failed to familiarize himself with the facts of this case and exhibited "animosity"

toward the plaintiff in his report. To the contrary, however, the court finds that the Special Master has commendably and comprehensively performed the task delegated to him by the order of reference. Moreover, the Master's report is well supported in both fact and law and its conclusions demonstrate no preference or bias toward any party to this suit.

Furthermore, the court finds nothing inequitable in assessing a $500.00 payment from the plaintiff and a similar amount from the defendants collectively for final payment of the Special Master's fee. Throughout the Special Master proceeding, the expenses have been divided in this manner without objection. Only now, after an unfavorable disposition, does the plaintiff complain.

The motion to reconsider and modify is therefore denied.

So ordered this the 12 day of December, 1973.

s/ Albert J. Henderson, Jr.
Judge, United States District Court for the Northern District of Georgia.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE POSTER EXCHANGE, INC.,
Plaintiff
vs.
NATIONAL SCREEN SERVICE CORPORATION, ET AL.
Defendants

Civil Action - No. 12497

FINAL JUDGMENT

This action came on for consideration before the Court, Honorable Albert J. Henderson, Jr., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, on December 12, 1973 granting summary judgment in favor of the distributor defendants,

It is ordered and adjudged that the Plaintiff take nothing, and that the defendants, COLUMBIA PICTURES CORPORATION, METRO GOLDWYN MAYER, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, TWENTIETH CENTURY FOX FILM CORPORATION, UNITED ARTISTS CORPORATION and WARNER BROS. PICTURES DISTRIBUTING CORPORATION recover of the plaintiff THE POSTER EXCHANGE, INC., their costs of action.

Dated at Atlanta, Georgia, this 27th day of December,

1973.

BEN H. CARTER
Clerk of Court

By: s/ Peggy L.Edmunds
Deputy Clerk

APPENDIX I

ORDER DENYING REHEARING

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 24, 1975

TO ALL COUNSEL OF RECORD

No. 74-1512 - The Poster Exchange, Inc. vs. National Screen Service Corp., et al.; Columbia Pictures Corp., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
by s/ Clare F. Sachs
Deputy Clerk

* on behalf of The Poster Exchange, Inc.

APPENDIX J

35 F.R.D. 558

The Poster Exchange, Inc.,
Plaintiff
v.
National Screen Service Corporation et al.,
Defendants.
Civ. A. No. 7665.
United States District Court
N.D. Georgia,
Atlanta Division
July 2, 1963

Action was brought under the Sherman Anti-Trust Act against moving picture distributor defendants. They made a motion for summary judgment. The District Court, Morgan, J., held that they were entitled to summary judgment, where there appeared to be no genuine issue of fact involved, and it was found in prior action that they were not involved in a conspiracy.

Motion for summary judgment granted.

See also D.C., 198 F. Supp. 557.

Federal Civil Procedure 2484

Moving Picture distributor defendants, which were sued under Sherman Anti-Trust Act for allegedly conspiring to monopolize business of distributing standard moving picture

accessories, were entitled to summary judgment, where there appeared to be no genuine issue of fact involved, and it had been determined in prior action that distributor defendants were not involved in conspiracy. Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A.; Sherman Anti-Trust Act §§ 1, 2 as amended 15 U.S.C.A. §§ 1, 2.

* * * * * *

Francis T. Anderson, Philadelphia,, Pa., for plaintiff

Gambrell, Harlan, Russell, Moye & Richardson, Atlanta, Ga., Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for defendant.

MORGAN, District Judge.

On June 7, 1963, the motion picture distributor defendants, Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Twentieth Century-Fox Film Corporation, United Artists Corporation, and Warner Bros. Pictures Distributing Corporation, joining together for the purpose of a motion, filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, asking that this Court dismiss the action instituted by the plaintiff under Sections 1 and 2 of the Sherman Act (15 U.S.C., §§ 1 and 2) on the ground that there is no genuine issue as to any material fact, and that these defendants are entitled to a judgment in their favor as a matter of law.

The movants in this case hold copyrights in respect to motion pictures produced and distributed by them and have

licensed National Screen to produce and distribute advertising accessories pertaining to those pictures. In the amended complaint filed by the plaintiff some two years after the filing of the original complaint, it is alleged that the movants have conspired with National Screen to monopolize the business of distributing standard motion picture accessories in the United States.

Substantially the same charge as is here made was made in the case of Lawlor v. National Screen Service Corporation, 3 Cir., 270 F.2d 146, cert. den. 362 U.S. 922, 80 S.Ct. 676, 4 L.Ed. 2d 742, in which the instant defendants, United Artists Corporation and Paramount Film Distributing Corporation, were also defendants. It seems to this Court that this Lawlor case is particularly significant in that the Third Circuit reviewed the historical origin of the motion picture distributor's relationship with National Screen and found absolutely no evidence of conspiracy. That opinion states that, commencing around 1939, the motion picture distributors severally determined that it was uneconomic to produce and distribute their own accessories. For that reason, each entered into a separate agreement with National Screen for that purpose. In so doing, each acted individually and without reference to the others. The Court stated, in respect to the relationship between the motion picture producers and National Screen:

> "* * * They [the distributors] contracted with National Screen because no comparable firm was available to undertake the task. The most that can be gleaned from the factual pattern is that the business climate affected each of the film companies in a substantially similar way and they individually decided to extricate themselves from a losing proposition."

Also strongly significant, in that it constitutes persuasive authority in this case, is the decision rendered by Judge Luongo in Vogelstein v. National Screen Service Corporation, D.C., 204 F.Supp. 591, in which the Court granted a summary judgment to the defendants sued therein in an action substantially similar to the case at bar. Because of a stipulation between the parties that any decision in Lawlor as to the existence of a conspiracy or monopoly would be dispositive of the conspiracy and monopoly questions in the other cases, the earlier claim by Vogelstein had been dismissed. Vogelstein, however, filed a further complaint in respect to the period of time subsequent to June 31, 1957, alleging a conspiracy between National Screen and the motion picture distributors, and, by amendment, alleged as a fact indicative of the conspiracy the refusal by National Screen on May 16, 1961, with the knowledge of the motion picture distributors, to deal further with him. The defendant's motion for summary judgment was granted, with Judge Luonogo, in the Vogelstein case, making the following statements concerning the Lawlor case:

> "It is true that the judgment in favor of defendants in Lawlor is supported not only by the findings that there was no unlawful monopoly or conspiracy, but on other findings as well, e.g., the Court found that plaintiffs in Lawlor had failed to show any harm. Those other findings in no way lessen the effect of the findings on the monopoly and conspiracy issues. The resolution of those issues depended not upon findings

based on the circumstances of any one dealer, but instead involved the nationwide development and practices of an industry. Either defendants had conspired to monopolize the poster business or they hadn't; either defendants monopolized the poster business or they didn't. The determination of those issues was not, as we regard it, dependant upon circumstances peculiar to Lawlor, Vogelstein or any other poster-dealer."

Therefore, it seems to be clear to this Court that the Lawlor findings as to conspiracy and monopoly were not limited to any particular plaintiff or locale, but were nationwide in scope.

Mr. Anderson, the attorney for the plaintiff, The Poster Exchange, Inc., admitted, in open court, recently when the Court heard arguments on this motion for summary judgment that he was relying on the same evidence in this case in an attempt to establish conspiracy as he was relying upon in the Lawlor case. Inasmuch as there is sound judicial authority denying the introduction and involvement of these movants in a conspiracy trial, this Court is persuaded and inclined to accept that determination as final. Repeated and protracted litigation involving the same questions and issues previously tried will serve no useful purpose as there must eventually be an end to litigation.

Consequently, it is the belief of this Court that the motion for summary judgment filed by the motion picture distributor defendants should be granted as there appears to be no genuine issue of fact involved herein.

As the motion for summary judgment has been granted, it will be unnecessary for the Court to pass on the requests for admissions and interrogatories heretofore propounded by the plaintiff.

It is so ordered.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-667

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,
Respondents

****

THE POSTER EXCHANGE, INC.,
Petitioner

versus

COLUMBIA PICTURES CORP., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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CASES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

NO. 75-667

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION,et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether a judicial determination by entry of summary judgments in two prior cases, that the facts brought forth by depositions, pre-trial conferences, and other discovery devices did not show either monopolization, attempted monopolization, or conspiracy under Sections 1, 2 or both of the Sherman Act, operate to bar two subsequent actions based solely upon a continuation of the same facts.

STATEMENT OF THE CASE

Respondents accept the judicial history of the New Orleans phase of this litigation as set forth at pages 111 through 114 of the Fifth Circuit's opinion.[1]

A review of that history reveals that the operative facts in this litigation are, contrary to Petitioners' representations, substantially different from those in *Lawlor v. National Screen Service Corp.*,2 upon which Petitioner relies so heavily. In *Lawlor*, the first suit between the parties was settled and no judicial determination whatsoever was made by the Court. In the instant case, the first two suits between the parties resulted in summary judgments in favor of the respondents with the express finding that there was no genuine issue of material fact to be tried as to the Petitioner's claim of monopolization, attempted monopolization, or conspiracy. Those judgments were not appealed and became final. A brief review of the two prior cases will put the instant consolidated actions in perspective and demonstrate the complete dissimilarity of these cases and the *Lawlor* case.

On May 17, 1961 Petitioner filed its first action against Respondent National Screen and six of the seven Producer-Respondents.[3] Petitioner filed its second action on November 30, 1964 against National Screen and all seven Producer-Respondents, charging the same alleged antitrust violations that were asserted in the instant consolidated third and fourth actions.

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1. 517 F.2d 110 (5th Cir. 1975).

2. 349 U.S. 322 (1955).

3. In the New Orleans phase of this litigation Columbia was not named as a defendant in the first suit, but was made a defendant in the three subsequent suits.

Petitioner's first two actions were dismissed by judgment of the District Court granting Respondents' motions for summary judgment on the ground that the facts brought forth by depositions, pre-trial conferences and other discovery devices did not show either monopolization, attempted monopolization or conspiracy under either Section 1 or 2 of the Sherman Act.

The complete identity as to parties and claims of both prior actions and the instant third and fourth consolidated actions was expressly conceded by Petitioner at page 11 of its brief in the Court of Appeals on its prior appeal with the following statement:

> "The instant case was filed August 11, 1967. As aforesaid the parties named therein are the same or substantially the same as the parties named in the two prior cases and the Complaint filed is substantially the same as the Complaints filed in the two prior cases except that in the instant case plaintiff claims to recover damage only for injuries suffered and losses sustained after the period covered by the prior cases."[4]

Based upon the summary judgments granted in Suits 1 and 2 the District Court on July 8, 1968 granted summary judgment in suit No. 3 on the ground of *res judicata*. The Court of Appeals, however, remanded the case to the District Court to afford Petitioner the opportunity to establish the existence of any new violations occurring after May 16, 1961.

After hearings had in the District Court, held pursuant to the Court of Appeals direction, the District Court made the following findings:[5]

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4. Docket No. 26,643 of the Fifth Circuit Court of Appeals.

5. Reproduced at pages 56-59 of Appendix "C" annexed to the Petition.

"Thus, one of the issues before this Court at this time is whether under this mandate, Plaintiff has demonstrated that it might be able to prove any post-1961 action or non-action by defendants.

"After a careful review of the record, the admissions, briefs and other pleadings on file and admissions by counsel for plaintiff in pre-trial conferences and in open court, we conclude that the answer to that question is No.

"Plaintiff has admitted in its answers to Request for Admissions that the facts constituting its case, insofar as proof of acts constituting anti-trust violations, all occrued before May 16, 1961.

"Counsel for plaintiff has repeatedly stated that the conspiracy and monopoly upon which it relies became complete on May 16, 1961, and that after that date defendants did not do or say anything different from what was said or done by them before that date.

"At the hearing on this motion, counsel for plaintiff stated in open court that if it is assumed that all acts committed by defendants prior to 1961 are legal and lawful, *plaintiff has no case and should be out of court.*

"The only overt acts attributable to defendants were those committed prior to, and which culminated with the May 16, 1961, termination of plaintiff's supply of advertising accessories by National Screen.

* * *

"In effect, what plaintiff contends is that all of the overt acts which violated the anti-trust laws were committed prior to May 16, 1961, but by continuing to do after that date what it did before that date, defendants have continuously violated the Sherman Antitrust Act and thus a new cause of action has accrued to plaintiff each and every day since May 16, 1961.

"We disagree. *What plaintiff has continued to overlook is the prior adjudication of Suits 1 and 2 holding that defendants were not engaged in an unlawful conspiracy, continuing or otherwise.*

"The issue presented in Suits 1 and 2 was whether defendants' pre-May 16, 1961 conduct violated the anti-laws. That same issue is presented in Suits 3 and 4. Basically plaintiff claims the same rights, and charges the same wrongs, against defendants in Suits 1 and 2 that are charged in Suits 3 and 4. New claims are not being asserted against these defendants merely the same old claims. (Refers to Chief Judge Brown's discussion in Exhibitors Poster Exchange v. National Screen, 421 F.2d 1313 at pp. 1316 et seq.) (Emphasis supplied)

THE DISTRICT COURT'S CONCLUSIONS OF LAW

Having made the foregoing findings, the District Court reached the following legal conclusions:

"Thus we conclude that Exhibitors' claims in Suits 3 and 4 are precisely the same as they were in Suits 1 and 2, except for the period of time for which it seeks damages. Since plaintiff looks to pre-1961 conduct to prove its damages, *and since that conduct has been judicially determined by Suits 1 and 2 to be neither monopolization, attempted monopolization or conspiracy, we conclude that the pending actions are barred by the principle of res judicata.* (Citing U.S. v. Moser, 266 U.S. 236)

"We further conclude that plaintiff is collaterally estopped from now litigating the question of whether defendants relationships and conduct pre-May 16, 1961 violated the antitrust laws.

"Under the doctrine of collateral estoppel, facts found through litigation in any form are conclusive upon the parties in any subsequent litigation. Determination by a prior court that acts of defendants were not violative of the antitrust laws is binding upon the parties in a subsequent action to have the same acts declared violative of these same laws. (Citing Blonder-Tongue Laboratories v. University of Ill. Foundation, 402 U.S. 313)

> "In addition, we conclude that plaintiff's claim is barred by the 4 year statue of limitations, 15 U.S.C. 15b. (Emphasis supplied)

Despite the overwhelming proof established by Petitioner's "admissions, briefs, and other pleadings on file, and admissions by counsel for plaintiff in pre-trial conferences, and in open Court," referred to by the District Court in its Findings, the Fifth Circuit, in order to be sure that those Findings were correct, assumed the burden of:

> ". . . . a close examination of the records in Suits 1 and 3 to determine the precise questions there resolved . . . ."

and the Fifth Circuit concluded that:

> "these judgments as we have already noted, were found clearly to hold in favor of the lawfulness of the defendants' pre-1961 actions. So much established, plaintiff Exhibitors is estopped from attempting to prove the alleged wrongfulness of the defendants' continuation of identical conduct during the period sued upon here; and the district court was correct in entering summary judgment for the defendants in this case."[6]

The Court of Appeals further concluded that since it affirmed the summary judgments on the basis of collateral estoppel, it did "not reach the alternative grounds." The alternative grounds" to which the Court of Appeals referred were *res judicata* and the statute of limitations, which the District Court had found to be applicable.

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6. p. 46 of Appendix "A" annexed to the Petition.

ARGUMENT

1. THE FIFTH CIRCUIT DECISION IS CONSISTENT WITH LAWLOR V. NATIONAL SCREEN SERVICE CORP.

As previously noted,[7] the facts in the instant case differ substantially from the facts of the *Lawlor* case. The prior judgment in *Lawlor* was a consent judgment based upon a settlement; in the instant cases, the prior judgments were the product of a adversary hearing at which Petitioner was given every opportunity to produce evidence of its claims, but was unable to do so. Moreover, *Lawlor* did not deal with the doctrine of collateral estoppel at all, but rather with res judicata, as this court noted at page 326 of its opinion:

> "Recognizing this distinction, the court below concluded that 'No question of collateral estoppel by the former judgment is involved *because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter.*' " *(Emphasis supplied)*

Far from supporting Petitioner's application, the quoted language confirms that a case which has been decided upon an express finding that there is no genuine issue of material fact precludes subsequent judicial inquiry into that finding. Further in the *Lawlor* opinion, this Court recognized that the judgment in the prior case did not bind the parties on any issue ". . . .such as the legality of the exclusive license agreements or their effect on Petitioner's business." However, in the instance case the legality of the agreements between the producers and National Screen was expressly put at issue in the prior litigation and their legality was sustained by entry of summary judgments, not by consent. Indeed, Petitioner strenuously urged that these agreements were illegal, but that contention was rejected.

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7. Supra at p. 2.

Petitioner simply ignores the crucial distinction between *Lawlor* and the instant cases, to which this Honorable Court so clearly points, *i.e.* that in the *Lawlor* case, the judgment entered dismissing the complaint rested upon a stipulation of settlement of the dispute -- without any judicial participation or determination and therefore could not possibly form the basis of a judicial estoppel. This basic determinative factor was high-lighted by this Honorable Court in its footnote No. 12 in which this Court quoted at length from its prior decision in *United States v. International Building Co.*,[8] -- a case in which this Court similarly refused to apply *res judicata* to a Tax Court determination made on the basis of a stipulation settling a dispute. In this connection, this Court quoted the following from the opinion in the *International Building* case:

> "We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a pro forma acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (see Russell v. Place, 94 US 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by that Court. They may or may not have been agreed upon by the parties. Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration."[9]

8. 345 U.S. 502 (1953).

9. *Id.* at p. 506.

In this Court's opinion in the *International Building* case, immediately following the foregoing quotations, this Court added the determinative conclusion which establishes the total irrelevance of the *Lawlor* case upon which Petitioner relies:

> "But unless we can say that they were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause."[10]

In the *Lawlor* case, there was no judicial determination, merely a stipulation between the parties authorizing the entry of a judgment dismissing the case.

However, in the instant consolidated cases, Suits 1 and 2 were terminated by summary judgments entered by the Court after judicial consideration of the evidence presented by depositions, pre-trial conferences, and other discovery devices, which judgments concluded that Petitioner had failed to raise a genuine issue with respect either to monopolization, attempted monopolization or conspiracy.

The aforementioned basic distinction was fully recognized by the court in *Vogelstein v. National Screen*, 11 which the Court of Appeals unanimously affirmed, [12] and plaintiff's petition for certiorari in that case was denied by this Court. [13]

2. PETITIONER'S CONTENTION THAT A SUMMARY JUDGMENT CANNOT FORM THE BASIS FOR COLLATERAL ESTOPPEL IS CONTRARY TO SETTLED LAW

The response by the Court of Appeal crisply rejecting Petitioner's contention would suffer dilution and loss of clarity,

10. Ibid.

11. 204 F.Supp. 591 at p. 596 (E.D.Pa. 1962).

12. 310 F.2d 738 (3d Cir. 1962).

13. 374 U.S. 840 (1963).

were one to attempt to summarize. Accordingly, we take the liberty to quote the following from the Court of Appeals earlier opinion remanding this case for possible establishment of post-1961 violations:

> "We reject out of hand the beguiling but superficial contention of Exhibitors [Petitioner] that neither Suit No. 1 nor No. 2 can have any collateral estoppel effect because no summary judgment can have such effect. This is based on an overemphasis of two assertions: (1) a collateral estoppel results only from an actual decision of an issue and (2) a summary judgment results from a finding that there is no genuine issue as to any material fact.
>
> "It would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. It would compel the useless ritual of a formal trial to get the equivalent ruling at the end of the evidence plaintiffs defendants, or all – of a directed verdict. Indeed, a more positive adjudication is hard to imagine. (Citing Hyman v. Regenstein, 5 Cir, 258 F.2d 502, 510, cert den. 359 U.S. 913; Wolcott v. Hutchins, 280 F.Supp. 559, 563 (S.S.N.Y.)).
>
> * * *
>
> "It is beyond doubt that Suit No. 1 disposed of the issue of whether the activities of Producers and National Screen in 1961 constituted an illegal conspiracy.
>
> * * *
>
> "Thus the Court, whether rightly or wrongly, necessarily determined judicially that the facts brought forth by deposition, pre-trial conferences, and other discovery devices did not show either monopolization, attempted monopolization or conspiracy on the part of National Screen under Sections 1, 2 or both." [14]

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14. Exhibitors Poster v. National Screen, 421 F.2d 1313 at p. 1320 (5th Cir. 1970).

Since Petitioner's claim in all four actions is that all Respondents had jointly conspired from 1940 to 1961 to effect through National Screen a monopoly in the manufacture and distribution of motion picture advertising accessories, the Court of Appeals' determination as to the legal effect of the prior summary judgments was correctly applied to all Respondents.

Moreover, it is settled law that the formalities of a trial, attended with formal findings of fact or an opinion by the Court, are not prerequisites to the application of the doctrine of collateral estoppel. [15] The *Napa Valley* case provides a good example of how far this Honorable Court has gone to prevent repetitive litigation. There the plaintiff utility had its contract rates reduced by the Railroad Commission, in spite of subsisting contracts at higher rates. Plaintiff petitioned the California Supreme Court to issue a Writ of Review of the Railroad Commission's decision – but the California Supreme Court refused to issue such a writ.

Plaintiff then sued in the United States District Court to enjoin the Commission from enforcing its orders.

The Commission moved to dismiss on the ground that the subject matter had been judicially passed upon by the Supreme Court of California when it refused to issue the writ, which refusal was pleaded in bar to the motion in the United States District Court. In affirming the District Court's dismissal, this Honorable Court said:

> "And so with the denial of the petition of the Electric Company, it had like effect and was the exercise of the judicial powers of the court. And we agree with the district court that 'the denial of the petition was necessarily a final judicial determination, based on the identical rights', asserted in that court and repeated here. Williams v. Bruffy, 102 U.S. 248, 255. *And further, to quote the district court 'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact'. . . Calaf*

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15. *Napa Valley Electric Co. v. R.R. Commission of California*, 251 U.S. 366 (1920).

v. Fugural v. Calaf v. Rivera, 232 U.S. 371; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299;

"The Court held, and we concur, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore, the decree of the District Court is affirmed."[16]

To the same effect, see *Thomas v. Consolidation Coal Co.*[17]

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16. *Id.* at pp. 372-373 (Emphasis supplied).

17. 380 F.2d 69, at p. 80 (4th Cir. 1967).

CONCLUSION

Respondents respectfully submit that the Petition fails to present any question of law or issue affecting public policy requiring review by this Honorable Court.

Petitioner's application for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1975

NO. 75-667

THE POSTER EXCHANGE INC.,
Petitioner

versus

COLUMBIA PICTURES CORP., et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

The question involved in this case is identical to that presented in *Exhibitors Poster.* See P. 1, *supra.*

STATEMENT OF THE CASE

This case relates to the Atlanta phase of this litigation.

Respondents [18] accept the judicial history as set forth at pages 118 through 121 of the Fifth Circuit's opinion.[19] While the history differs slightly from the New Orleans phase of this litigation, the operative facts are substantially identical to the New Orleans phase.

ARGUMENT

The arguments advanced by th Respondents in *Exhibitors Poster, supra,* are equally applicable to the instant case and are adopted herein by reference.

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18. While Columbia was a party to this phase of the litigation in the Fifth Circuit, it is not a party here since the Fifth Circuit remanded as to Columbia in Atlanta and the instant petition for certiorari seeks no relief against Columbia. Universal Film Exchanges, Inc., a party in the New Orleans phase of this litigation, has never been a party in the Atlanta phase. Thus, the respondents in the Atlanta phase consist of MGM, Paramount, Fox, United Artists, and Warner.

19. The Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117 (1973).

CONCLUSION

No basis for granting a writ of certiorari has been advanced by Petitioner. There is no conflict between the Fifth Circuit's decisions in these companion cases and any case decided by this Court. To the contrary, the decisions are consistent with the principles enunciated this Court in its *Blonder-Tongue*[20] decision.

Respectfully submitted,

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20. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Opposition have been served on the following counsel for Petitioners, at the addresses following their names, by United States mail, postage prepaid, on this 2nd day of December, 1975:

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NO. 75 - 667

In the Supreme Court of the United States

OCTOBER TERM, 1975

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Respondents

AND

THE POSTER EXCHANGE, INC.,
Petitioner

versus

COLUMBIA PICTURES CORP., et al.,
Respondents

PETITIONERS' REPLY BRIEF

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OTHER AUTHORITIES

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PETITIONERS' REPLY BRIEF

ARGUMENT

Respondents' Brief in Opposition is less remarkable for what it says than for what it does not say.

Most significant is the absolute failure to deny that the effect of the decision below is to invest the respondents with immunity from liability for future violations of the antitrust laws of the United States.

As this Court said in the *Lawlor* case (349 U.S. at 329):

> "Such a result is consistent with neither the antitrust laws nor the doctrine of res judicata."

Moreover, it is not denied that in the Atlanta phase of this litigation one of the respondents - National Screen Service Corporation - after a full-dress trial on the merits, was found guilty of using "grossly predatory practices"[1] in violation of the antitrust laws and has been compelled to comply with a money judgment of Four Hundred Fifty Thousand and No/100 ($450,000.00) Dollars.

The effect of the decision below is to authorize this grossly predatory monopolist - National Screen Service Corporation - to continue its unlawful practices in the New Orleans motion picture district, with immunity from liability for an indefinite time in the future.

In other words, National Screen Service Corporation is actually authorized to do in New Orleans what it has been roundly condemned for doing in Atlanta.

And all of this is in plain conflict with the unanimous opinion written for this Court by the then Chief Justice in the *Lawlor* case.[2]

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1. *Poster Exchange Inc. v. National Screen Service Corp.*, 431 F2d 334, 341 (5th Cir. 1970) cert. den. 401 U.S. 912; rehearing den. 401 U.S. 1015.

2. *Lawlor v. National Screen Service Corp., (1955) 349 U.S. 322.*

The respondents attempt to distinguish *Lawlor* on the ground that the judgment involved in that case was entered by consent of the parties, whereas the judgments entered in the instant cases were entered summarily.

This distinction is said to constitute a major difference - it is said that a consent judgment ". . . could not possibly form the basis of a judicial estoppel" (Respondents' Brief at p. 8).

But the *Lawlor* opinion, itself, stands for the exact opposite of that.

More fully, in *Lawlor* the Court said (349 U.S. at 327):

> "It is of course true that the 1943 [consent] judgment dismissing the previous suit 'with prejudice' bars a later suit on the same cause of action" (Citing cases).

It is therefore submitted that respondents' attempt to distinguish *Lawlor* must be rejected.

The plain truth is that the decision below, if allowed to stand, would emasculate *Lawlor*.

Other noteworthy aspects of respondents' brief are, we submit, as follows:

1.

At Page 7 respondents state that: *"Lawlor* did not deal with the doctrine of collateral estoppel at all but rather with res judicata . . .", but the fact is that collateral estoppel

is twice referred to and rejected in *Lawlor*.

More fully, in its first reference, this Court, quoting with approval the court below, said (349 U. S. at 326):

> "No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding of fact which will preclude the parties to that litigation from questioning the finding thereafter."

And in a second reference, this Court said (349 U. S. at 327):

> "It is likewise true that the [former] judgment was unaccompanied by findings and hence did not bind the parties on any issue - such as the legality of the exclusive license agreements or their effect on petitioner's business - which might arise in connection with another cause of action. To this extent we are in accord with the decision below. We believe, however, that the court erred in concluding that the 1942 and 1949 suits were based on the same cause of action."

It is clear, therefore, that this Court expressly rejected both res judicata and collateral estoppel, and it is equally clear that the decision below is in plain conflict with what this Court said.

2

Respondents' brief ignores the fact that in the leading case of *Cromwell v. County of Sac* (1877) 94 U.S. 351, this Court stated, in substance and effect, that a litigant can be collaterally estopped only by issues of fact that have been "actually litigated" and that litigation requires the verdict of a jury or the finding of a trier of facts.

Similarly, respondents ignore the fact that in the Restatement of Judgments (§ 68, Comment c) it is stated that a question of fact can be said to be *litigated* only when "a question of fact is put in issue by the pleadings and is submitted to the jury or other trier of facts for its determination . . ."

The respondents do not cite either the Restatement or *Cromwell v. County of Sac.*

3

Respondents state (at Pages 3 and 5) that the summary judgments entered in these cases were accompanied by "findings" of fact but we submit that it is too obvious for argument that on a motion for summary judgment the motion judge has no power to make findings of fact. If there are findings to be made, the motion for summary judgment must be denied and the case listed for trial.

4

At Page 11, respondents assert that:

> ". . .it is settled law that the formalities of a trial . . . are not prerequisites

> to the application of the doctrine of collateral estoppel."

That statement of the law is said to be supported by the Supreme Court case of *Napa Valley Elec. Co. v. Railroad Commission*, 251 U.S. 366 (1920).

But the fact is that in the *Napa Valley* case, the court was not concerned with the doctrine of collateral estopel.

In that case, the ruling was that a second proceeding was based on the same cause of action as that involved in the first proceeding, and that, therefore, the plaintiff was barred by res judicata.

The doctrine of collateral estoppel is not even mentioned in the opinion of thc Court.

Respondents cite also *Thomas v. Consolidated Coal Co.*, 380 F2d 69 (1967) but that case also deals solely with res judicata; collateral estoppel is not mentioned.

As aforesaid, in *Lawlor* this Court said that:

> "No question of collateral estoppel by the former judgment is involved because the case was never tried . . ." (349 U.S. at 326).

It is submitted that neither the court below nor counsel have been able to cite any authority contrary to petitioners' contention that there can be no collateral estoppel unless a question of fact has been actually litigated and determined after a trial before a jury or other trier of facts.

It is therefore submitted that this Court should review the decision below and reverse it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Brief have been served on Tench C. Coxe, 1400 Candler Building, Atlanta, Georgia, 30303; Phillip A. Wittman, 1000 Whitney Building, New Orleans, Louisiana, 70130; Walter S. Beck, 40 West 57th Street, New York, New York, 10019; and Gibbons Burke, One Shell Square, New Orleans, Louisiana 70139, this 18th day of December, 1975.

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